No. 88-389-AFX
Status: GRANTED

Title: Public Employees Retirement System of Ohio, Appellant
v.
June M. Betts

Docketed:
August 31, 1988

Court: United States Court of Appeals for the Sixth Circuit

Counsel for appellant: Sutter,Andrew I.

Counsel for appellee: Laufman,Robert F., Sutter,Andrew I.

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1988	G	Statement as to jurisdiction filed.
2	Sep 23 1988		Motion of appellee June Betts to affirm filed.
3	Sep 23 1988	G	Motion of appellee for leave to proceed in forma pauperis filed.
4	Sep 28 1988		DISTRIBUTED. October 14, 1988
5	Oct 3 1988	X	Supplemental brief of appellant P.E.R.S.O. filed.
6	Oct 17 1988		Motion of appellee for leave to proceed in forma pauperis GRANTED.
7	Oct 17 1988		PROBABLE JURISDICTION NOTED.
			**********
9	Nov 14 1988		Order extending time to file brief of appellant on the merits until December 14, 1988.
10	Nov 16 1988		Record filed.
		*	Certified copy of original record, supplement and C. A. proceedings received.
11	Dec 1 1988		Joint appendix filed.
18	Dec 12 1988		Waiver of right of appellee Hamilton County Bd. of Mental Retardation to respond filed.
12	Dec 14 1988		Brief amicus curiae of Pennsylvania filed.
13	Dec 14 1988		Brief amicus curiae of California State Teachers' Retirement System filed.
14	Dec 14 1988		Brief of appellant P.E.R.S.O. filed.
15	Dec 14 1988		Brief amicus curiae of National Public Employers Labor Relations Association filed.
16	Dec 14 1988		Brief amicus curiae of Association of Private Pension and Welfare Plans filed.
17	Dec 14 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
20	Dec 21 1988		Order extending time to file brief of appellee on the merits until January 31, 1989.
21	Jan 31 1989		Brief of appellee June Betts filed.
22	Jan 31 1989		Brief amicus curiae of American Association of Retired Persons filed.
23	Jan 31 1989		Brief amicus curiae of United States filed.
24	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 28, 1989. (4TH CASE)
25	Feb 3 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Feb 21 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 88-389-AFX

Entry	Date	Note	Proceedings and Orders
27	Feb 21 1989		CIRCULATED.
28	Feb 22 1989	X	Reply brief of appellant P.E.R.S.O. filed.
29	Mar 28 1989		ARGUED.

88-389
CASE NO.

Supreme Court, U.S.
FILED
AUG 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Assistant Attorney General
Litigation Chief,
Chief Counsel's Staff

State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

ATTORNEYS FOR APPELLANT

QUESTION PRESENTED

Must age-based distinctions in bona fide employee benefit plans, including plans promulgated prior to the passage of the Age Discrimination in Employment Act, be justified by a substantial business purpose?

PARTIES

The Appellant in this action is the Public Employees Retirement System of Ohio.

The Appellee is June M. Betts.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

THE QUESTION PRESENTED IS SUBSTANTIAL 5

A. Pre-existing Benefit Plan As a Subterfuge 6

B. Benefit Plans In General 10

CONCLUSION 12

APPENDIX 13

TABLE OF AUTHORITIES

Cases — Page

Alford v. City of Lubbock, Texas,
664 F.2d 1263 (5th Cir.), *cert. denied,*
456 U.S. 975 (1982) 8

Cipriano v. Board of Education of
City School District,
785 F.2d 51 (2nd Cir. 1986) 10

Douglas v. Seacoast Products, Inc.,
431 U.S. 265 (1977) 7

E.E.O.C. v. City of Mt. Lebanon,
842 F.2d 1480 (3rd Cir. 1988)..... 10

E.E.O.C. v. Home Insurance Company,
627 F.2d 252 (2nd Cir. 1982) 8

E.E.O.C. v. Maine,
644 F. Supp. 223 (D. Me. 1986), *aff'd. mem.,*
823 F.2d 542 (1st Cir. 1987) 8, 9

E.E.O.C. v. Orange County,
837 F.2d 420 (9th Cir. 1988) 8

Gonsalves v. Catepillar Tractor Co., Inc.,
634 F.2d 1065 (7th Cir. 1980) 8

International Brotherhood of Electrical Workers,
Local 1439 v. Union Electric Co.,
585 F. Supp. 261 (E.D. Mo. 1984), *aff'd.,*
761 F.2d 1257 (8th Cir. 1985) 8

United Airlines, Inc. v. McMann,
434 U.S. 192 (1977) ..... *passim*

Statutes

29 U.S.C. § 623(f)(2) ..... *passim*

Ohio Revised Code Section 145.35 ..... *passim*

Ohio Revised Code Section 3307.42 6

Ohio Revised Code Section 3309.39 6

Regulations

29 C.F.R. 860.120(a)(1) 5, 10

29 C.F.R. 860.120(f)(1)(iii) 10

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued on June 3, 1988, is set forth in the Appendix (A-1) and is reported at 848 F.2d 692. The decision of the United States District Court for the Southern District of Ohio, Western Division, is also set forth in the Appendix (A-20) and is reported at 631 F. Supp. 1198.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on June 3, 1988, holding Ohio Revised Code Section 145.35 in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sections 621-634. This action was initiated by Appellee in the district court by filing a complaint pursuant to 42 U.S.C. § 1983 and 29 U.S.C. § 626(c). The Notice of Appeal was filed with the Sixth Circuit on August 1, 1988, within 90 days of entry of the court of appeals' judgment. This appeal is

taken, and jurisdiction conferred upon this Court, under 28 U.S.C. Section 1254(2).

If the Court determines that an appeal is not proper in this case, Appellant respectfully requests that this Jurisdictional Statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. Section 2103.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix (A-38). The federal regulations involved are set forth in the Appendix (A-40).

STATEMENT OF THE CASE

This appeal is brought by the Public Employees Retirement System of Ohio ("PERS") from the judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") that a law of the State of Ohio, Ohio Revised Code § 145.35 ("O.R.C. § 145.35") violates the Age Discrimination in Employment Act ("ADEA" or "Act"), 29 U.S.C. §§ 621-634. The appellate court held that O.R.C. § 145.35 does not qualify for exemption as a "bona fide employee benefit plan" pursuant to 29 U.S.C. § 623(f)(2) because it makes distinctions in benefits between older and younger workers that are not based on age-related cost factors.[1]

[1] O.R.C. § 145.35, in relevant part, provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program.

PERS, the nation's seventeenth largest pension system,[2] was established in 1933 to provide retirement benefits, including regular income and health care, to the majority of Ohio's public employees.[3] Under the PERS statutory scheme, retirement benefits are available to members who terminate their public employment and qualify on the basis of either their age and service or because of permanent disability. Neither age and length of service nor disability retirement benefits cease at any particular age, although disability retirement may be converted, at the request of the retirant, to an age and service retirement at the appropriate time. Any member of PERS who has a minimum of five years of service credit and has not attained the age of sixty may apply for disability retirement benefits. The age limitation was incorporated in O.R.C. § 145.35 when the statute was adopted in 1933.

From approximately 1979 until 1984, June Betts ("Betts") was employed by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB") as a speech pathologist. In 1984, because of acknowledged unsatisfactory job performance, Betts voluntarily accepted reassignment to a lesser position. In September of that year, apparently because of poor health, Betts became incapable of satisfactorily performing her new duties and once again voluntarily accepted reassignment to a less responsible position with lower pay.

By May 1985, Betts' job performance had deteriorated to such an extent that it was recognized she no longer could perform any work-related duties. Later that month, HCB informed Betts that it would have no choice but to initiate action to have her placed on unpaid medical leave. Neither

[2] *Pensions & Investment Age*, January 25, 1988.

[3] During calendar year 1984, PERS disbursed a total of $336,443,286.01 in age and service retirement benefits and $39,722,278.09 in disability retirement benefits.

HCB nor PERS possessed any authority to require Betts to retire.

As an alternative to medical leave, HCB noted that Betts was eligible for age and service retirement benefits from PERS. It was suggested that Betts consider applying, in which case she would receive a monthly pension allowance and uninterrupted health coverage.

On June 3, 1985, Betts, who was sixty-one years old at the time, voluntarily submitted to HCB a letter announcing her retirement. Later that month, Betts' attorney submitted to HCB an application for disability retirement rather than age and service retirement. This application was not forwarded to PERS until July 22, 1985, eight days after the simultaneous filing of an age discrimination charge with the Equal Employment Opportunity Commission ("E.E.O.C.") and her complaint in this matter. On the following day, Betts' attorney submitted to PERS an application for age and service retirement requesting that it be processed only if Betts' application for disability retirement could not be approved. Betts subsequently was notified by PERS that her application for disability retirement benefits could not be considered in light of the age limitation contained in O.R.C. § 145.35. Her application for age and service retirement benefits and health care coverage then was approved and processed.

On March 27, 1986, the United States District Court for the Southern District of Ohio, Western Division, granted Betts' motion for summary judgment and denied PERS' cross-motion for summary judgment on the ground that the provision in O.R.C. § 145.35 limiting eligibility to apply for disability retirement benefits to persons who have not attained the age of sixty violated the ADEA. (A-20.) The district court rejected PERS' argument that O.R.C. § 145.35 was a component of a "bona fide employee benefit plan" pursuant to 29 U.S.C. § 623(f)(2) and, therefore, exempt from the requirements of the Act.

The district court's holding was based on its determination that Betts had been involuntarily retired and constructively

discharged because she could not apply for disability retirement benefits. (A-30.) More important, however, it determined that O.R.C. § 145.35 did not qualify for the exemption under 29 U.S.C. § 623(f)(2) because distinctions in benefits offered to older and younger employees were not based on significant age-related cost considerations, as required by federal regulations. *See* 29 C.F.R. 860.120(a)(1). (A-28.)

A divided panel of the Sixth Circuit affirmed the decision of the district court. The appellate court held that the "critical factor" in rejecting PERS' claim that O.R.C. § 145.35 satisfied the requirements of § 623(f)(2) was that the different treatment of older and younger workers was not based on age-related cost considerations. As the Sixth Circuit noted, O.R.C. § 145.35 could pass muster only if older workers were denied the opportunity to apply for disability retirement benefits because of "a substantial business purpose." (A-5.)

The majority reached that conclusion only after determining that when 29 U.S.C. § 623(f)(2) was amended in 1978, "Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H.R. Conf Rep. No. 95-950, 95th Cong., 2d Sess. 8, *reprinted* in 1978 U.S. Code Cong. & Admin. News 504, 529."

A lengthy dissenting opinion (A-7) took exception with the district and appellate courts' rulings, implicitly rejecting the contention that the *McMann* decision had been legislatively overruled. (A-16.) The dissent concluded that O.R.C. § 145.35 satisfied the requirements of 29 U.S.C. § 623(f)(2) and that the decision of the district court should be reversed.

THE QUESTION PRESENTED IS SUBSTANTIAL

The Sixth Circuit's divided panel concluded that a bona fide employee benefit plan established under Ohio law prior

to the passage of the ADEA must justify age-based distinctions in benefits by demonstrating the existence of an underlying substantial business purpose. This holding is in direct conflict with this Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), is contrary to the positions of other courts of appeals, and promotes an interpretation of federal law that requires revision of the nation's seventeenth, eighteenth, and one-hundred twenty-fifth largest retirement systems.[4] The Sixth Circuit's unprecedented interpretation of 29 U.S.C. § 623(f)(2), a frequently litigated provision of the ADEA, warrants this Court's full attention.

A. Pre-existing Benefit Plan As A Subterfuge.

At all times relevant, the ADEA has contained an exemption from its proscriptions for "bona fide employee benefit plans." *See* 29 U.S.C. § 623(f)(2). Until 1978, this exemption provided that

> [i]t shall not be unlawful for an employer, employment agency, or labor organization -
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

In *McMann*, the only Supreme Court case interpreting the exemption, it was determined that 29 U.S.C. § 623(f)(2) permitted involuntary retirement. Of greater significance to

[4] Although PERS is the only retirement system named in this lawsuit, the State Teachers Retirement System of Ohio, *see* O.R.C. § 3307.42, and the School Employees Retirement System of Ohio, *see* O.R.C. § 3309.39, have disability retirement provisions identical to the PERS provision, O.R.C. § 145.35, invalidated by the Sixth Circuit.

the case at bar, the *McMann* Court held that a plan in existence prior to the passage of the ADEA could not be a subterfuge to evade the purposes of the Act and an employer did not have to demonstrate that a business or economic purpose served as the basis for distinctions in benefits between older and younger workers. *McMann*, 434 U.S. at 203.

In 1978, Congress responded to the *McMann* decision by amending 29 U.S.C. § 623(f)(2) to prohibit involuntary retirement. Congress did not, however, add any language to the exemption to indicate dissatisfaction with *McMann* in respect to the issue of subterfuge.[5]

In the case at bar, the Sixth Circuit, nevertheless, has determined that "[i]n amending section 623(f)(2), Congress expressly repudiated the Supreme Court's decision . . . that a bona fide benefit plan that treated older workers differently and predated the Act need not be justified by any business purpose." (A-4.) (Emphasis added.) The "express" repudiation relied on by the Sixth Circuit is found not in the Act itself, but in legislative history.

Under ordinary circumstances, reliance on legislative history to override unambiguous statutory language is unorthodox. *See McMann*, 434 U.S. at 199. It is extraordinary under the facts of this case because it must be presumed that Congress ratified this court's interpretation of "subterfuge" when, in 1978, the legislature amended 29 U.S.C. § 623(f)(2) to prohibit involuntary retirement, but did not change any of the language dealing with subterfuge. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-

[5] 29 U.S.C. § 623(f)(2) was amended to add the following phrase:

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .

79 (1977) (Congress ratifies legislation when that legislation is re-enacted in substantially the same form).

Other courts have adopted a position exactly opposite to that of the Sixth Circuit in respect to the proper interpretation of the effect of the 1978 amendment. The Court of Appeals for the Ninth Circuit, for example, has stated that

> [d]espite broad language in the legislative history, the 1978 amendment to . . . [section 623(f)(2)] only dealt with involuntary retirement provisions. Congress could have easily invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted [29 U.S.C. § 623(f)(2)] without amending the subterfuge language.

E.E.O.C. v. Orange County, 837 F.2d 420, 422 (9th Cir. 1988). (Citations omitted.)

The Ninth Circuit is not alone in its opinion that the *McMann* decision enjoys continuing vitality in its application to the definition of subterfuge. The First, Second, Fifth, Seventh, and Eighth Circuits have all either issued or affirmed decisions consonant with that of the Ninth Circuit. *See E.E.O.C. v. Maine*, 644 F. Supp. 223, 226 (D.Me. 1986), *aff'd. mem.*, 823 F.2d 542 (1st Cir. 1987); *E.E.O.C. v. Home Insurance Company*, 672 F.2d 252, 258 (2d Cir. 1982); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *Gonsalves v. Catepillar Tractor Co., Inc.*, 634 F.2d 1065, 1066 (7th Cir. 1980); *International Brotherhood of Electrical Workers, Local 1439 v. Union Electric Co.*, 585 F. Supp. 261, 264 (E.D. Mo. 1984), *affd.*, 761 F.2d 1257 (8th Cir. 1985).

The *Maine* decision is particularly instructive because it involved an employee benefit plan very similar to O.R.C. §

145.35.[6] The district court's decision, adopted by the First Circuit, parallels the position espoused by the Ninth Circuit and provides a striking contrast to the holding of the Sixth Circuit:

> The [1978] amendment . . . left undisturbed the *McMann* Court's interpretation of the terms "*bona fide*" and "subterfuge." . . . If Congress had wished to state that a plan's chronology alone would not satisfy the "subterfuge" prong of section [623(f)(2)], it could have plainly said so. Since Congress' language merely prohibits the involuntary termination of any worker under an exempt retirement plan, the Court assumes that Congress meant no more than it expressly stated.

Maine, 644 F. Supp. at 226. The *Maine* Court also concluded that the legislative history did not support the proposition that Congress intended to legislatively reverse *McMann's* holding on the issue of subterfuge. 644 F. Supp. at 227 n. 5.

Although the *Maine* case was brought to the attention of the Sixth Circuit, the majority's decision includes no mention of it[7] or any of the other cases previously referred to in which 29 U.S.C. § 623(f)(2) is discussed. This dichotomy between the Sixth Circuit decision and the decisions of other appellate courts, separate and apart from the obvious conflict between the *McMann* decision and the decision in the instant case, offers compelling justification for plenary review of this matter by this Court.

---

[6] The United States District Court of Kansas has also upheld the legality of a plan with an age restriction similar to the one contained in O.R.C. § 145.35. *See E.E.O.C. v. Cargill, Inc.*, No. 81-4193 (D. Kan. Oct. 12, 1984), *appeal docketed*, No. 84-2692 (10th Cir. Dec. 10, 1984).

[7] The relevance of the *Maine* decision is discussed by the dissent in this case.

B. Benefit Plans In General

The broader question in this case concerns the type of evidence that must be offered by an employer in order to demonstrate the absence of subterfuge. The Sixth Circuit placed heavy reliance on 29 C.F.R. 860.120(a)(1) and (f)(1)(iii),[8] which provide that the absence of subterfuge may be demonstrated only by the existence of age-based cost considerations. (A-40.) Yet these administrative regulations, like the Sixth Circuit's opinion that *McMann* was overruled in its entirety by the 1978 amendment to 29 U.S.C. § 623(f)(2), are not reflective of statutory language. To the contrary, they ignore this Court's pronouncement in *McMann* that subterfuge means "a scheme, plan, stratagem, or artifice of evasion." *McMann*, 434 U.S. at 203. The *McMann* definition of subterfuge at least implies an examination of subjective criteria, such as motive, not simply objective ones such as age-based cost considerations. As noted by the concurrence in *E.E.O.C. v. City of Mt. Lebanon*, 842 F.2d 1480, 1495 (3rd Cir. 1988) (Hutchinson, J., concurring), 29 U.S.C. § 623(f)(2) "contemplates . . . a good faith defense" which is improperly restricted by an "emphasis on the objective criterion" demanded by federal regulations.[9]

Admittedly, the view expressed by the concurring judge in *Mt. Lebanon* was not shared by his brethren. But neither has every circuit embraced the majority's position in that decision which implies that cost considerations must be actuarily based. *See, e.g., Cipriano v. Board of Education of City School District*, 785 F.2d 51, 54 (2nd Cir. 1986) (federal regulations do not require that "cost considerations . . . be actuarily based"). Indeed, both the Second Circuit in *Cipriano* and the Ninth Circuit in *Orange County* expressed

[8] These provisions of the Code of Federal Regulations have been recodified at 29 C.F.R. § 1625.10(a)(1) and (f)(1)(iii).

[9] The dissent in the instant matter noted how the relevant regulations "add a dimension, economic cost justification, not in the statute." (Wellford, J., dissenting.) (A-18.)

reservations concerning the faithfulness of these regulations to the letter of the law. *See* 785 F.2d at 58 ("we do not wish to be understood as endorsing every detail of the regulations"); and 837 F.2d at 422 n. 2 (court "must consider whether the regulation represents a 'reasonable construction of' statute"), respectively. Moreover, the notion that an employer is restricted to a presentation of objective data to dispel an accusation of intentional discrimination fosters an unduly narrow interpretation of statutory language which, it must be assumed, was intended by Congress to be given "its ordinary meaning." *McMann*, 434 U.S. at 203. Thus, the Sixth Circuit's holding that objective criteria alone are available to an employer for purposes of disproving that a provision of a bona fide employee benefit plan was not designed to evade the Act is inconsistent with the usual rules of statutory construction and results in a distortion of the analysis that should be applied to cases in which the question of subterfuge arises. Because the issue of subterfuge is a commonly disputed element in any inquiry into the application of 29 U.S.C. § 623(f)(2), the Sixth Circuit's reliance on federal regulations to expand the scope of 29 U.S.C. § 623(f)(2) has ramifications not only for the parties and the majority of Ohio's public employees, but for every pension system that distinguishes between older and younger employees in respect to the type or level of benefits available. The Sixth Circuit's decision, therefore, is of such significance that it deserves the full consideration of this Court.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record

30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Assistant Attorney General
Litigation Chief,
Chief Counsel's Staff

30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

ATTORNEYS FOR APPELLANT

APPENDIX*

TABLE OF CONTENTS

Page

A. Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit (Case Nos. 86-3676/4034), entered June 3, 1988 ..... A-2

B. Opinion and Order of the United States District Court for the Southern District of Ohio, Western Division (Case No. C-1-85-1108), entered March 27, 1986 ..... A-20

C. Notice of Appeal, filed August 4, 1988 ..... A-35

D. Text of Statutes Involved

1. 29 U.S.C. § 623(a) A-38
2. 29 U.S.C. § 623(f)(2) A-38
3. Ohio Revised Code Section 145.35 ..... A-38

E. Text of Regulations Involved

1. 29 C.F.R. 860.120(a)(1) A-40
2. 29 C.F.R. 860.120(f)(1)(iii) A-40

*The opinions of the Sixth Circuit and district court have been reproduced verbatim, including any typographical errors.

Opinion of the United States Court of Appeals for the Sixth Circuit
(Reported at 842 F.2d 692)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-3676/4034

Decided and Filed June 3, 1988

* * *

JUNE M. BETTS,
Plaintiff-Appellee,

v.

HAMILTON COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
AND
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Defendants-Appellants.

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the court, in which MERRITT, Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 7-19) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Defendants Hamilton County Board of Mental Retardation and Developmental Disabilities and Public Employees Retirement System of Ohio appeal from an order granting June Betts' motion for summary judgment and declaratory judgment in this age discrimination case.

Betts worked for the Mental Retardation Department of Hamilton County and was covered by the state retirement system and the Age Discrimination in Employment Act, 29 U.S.C. § 621-34. Her work degenerated because of medical problems until she became disabled at age sixty-one. After negotiations, she was given the choice of two alternatives: an unpaid medical leave or length of service retirement. She was not offered disability retirement as a third choice. She was not allowed to have a disability pension because of a provision in Ohio's pension law preventing persons over sixty from receiving disability pensions and allowing them only to receive regular age retirement pensions.[1] Betts accepted length of service retirement and now receives $158.50 per month in benefits. A similarly situated younger employee would have been entitled to a disability benefit of $355.02 per month.

In granting Betts' motion for summary judgment, the district court held that the plan violated the Act. The district court found that the plan was discriminatory on its face and in its effect and did not qualify for the bona fide employee benefits plan exception to the Act. Specifically, the district court concluded that the plan did not qualify under the exception because it is not the type of plan covered by the exception and because the defendants did not act in observance of the plan when they forced Betts into retirement because of her age.

---

[1] Ohio Revised Code § 145.35 provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

Under 29 U.S.C. § 623(a)(1), an employer may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment. When there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2). In 1978, Congress further limited this exception by providing that plans that fall within the exception are nevertheless unlawful if they permit or require the involuntary retirement of an individual because of age.[2] In amending section 623(f)(2), Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann,* 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H. R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 529. In light of this legislative intent, the district court noted that the "critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors as set forth in the regulatory interpretation of that section." 631 F.Supp. 1198,

[2] Section 623(f)(2) now provides:

It shall not be unlawful for an employer . . .

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . . .

1204 (S.D. Ohio 1986). *See* 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii).[3] We agree. Under the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose. As the Seventh Circuit recently declared, "where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623(f)(2)]." *Karlen v. City Colleges of Chicago,* 837 F.2d 314, 319 (7th Cir. 1988). *Accord Equal Employment Opportunity Commission v. City of Mt.*

[3] 29 C.F.R. 860.120(a)(1) provides:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, [29 U.S.C. § 623(f)(2)] does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in [29 U.S.C. § 623(f)(2)], benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. 860.120(f)(1)(iii) provides:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.

Lebanon, Pennsylvania, No. 87-3189 (3d Cir. March 30, 1988), slip op. at 25-26 ("By adding § 623(f)(2), Congress intended to relieve employers of the burden of providing equal benefits to all employees only when the cost of providing lower benefits to older workers is approximately equal to the cost of providing greater benefits to younger workers.").

In her motion for summary judgment, Betts argued that the plan could not be justified by any business purpose. Under the disability plan, two employees with the same number of service years and the same final salary are treated identically unless one of the two employees is 60 or older. Betts argued that there was no economic justification for providing the younger employee with disability benefits while denying disability benefits to the older employee. To the contrary, Betts suggested that this arrangement is likely to cost the employer more because the employee who becomes disabled at a younger age should draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older.

Despite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty. Consequently, the district court reached its conclusion that "the benefit package . . . is not justified by significant cost considerations" without the benefit of having the issue fully briefed by both parties. The defendants now argue that, at a minimum, this court should remand the case to allow them to put evidence before the district court concerning age-related cost considerations. The defendants do not contend that the district court prevented them from presenting evidence of cost considerations. *Cf. Cipriano v. Board of Education of City School District*, 785 F.2d 51 (2d Cir. 1986). In fact, the record indicates that, despite Betts' arguments that the plan cannot be justified by cost considerations, the defendants made no effort to submit any evidence on the subject. Consequently, we have no choice but to affirm the district court's entry of summary judgment in favor of Betts; a non-moving party who, in the face of a motion for summary judgment, makes no effort to satisfy his burden of production

is not entitled to a second opportunity to satisfy his burden once the motion has been granted.

Finally, we find that the district court did not abuse its discretion in awarding attorney's fees.

The judgment of the district court is affirmed.

WELLFORD, Circuit Judge, dissenting.

This is a difficult case in which plaintiff desires to obtain disability benefits which would give her a greater amount than would retirement benefits which she contends she was forced to seek. Betts was physically incapable of continuing public employment at age 61, and had only five years of active service with her employer at the time of retirement. She contends that the practice of defendants and their plan which carries out an Ohio statutory requirement violates the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.).

The defendants maintain that the plaintiff voluntarily retired due to her diabetic condition, and thus has no basis for her action asserting age discrimination. They also contend that Betts chose to retire instead of undergoing a medical examination, the result of which may have given the parties other options less favorable to Betts than forced retirement. Defendants also maintain they are carrying out the terms of a bona fide employee benefit or retirement plan which is exempt from ADEA requirements. (29 U.S.C. § 623(f)(2)). Defendants assert, in addition, that if plaintiff were, in effect, discriminated against under the present law and regulations, defendants' practice under the plan in question pre-existed ADEA and is lawful. To put it another way, discrimination, if any, was due to length of service rather than age and was thus not in contravention of ADEA. PERS, moreover, contends that it is not an "employer" within the meaning of ADEA, and thus should not, in any event, be liable for imposition of plaintiff's attorney fees. I agree with the

contentions of the defendants and, therefore, dissent from the view of other members of the panel.

The district court concluded that the plan was discriminatory on the basis of age, although in some respects it appeared to be justified. The district court also found that the claimed exemption from ADEA sought by the defendants did not apply. The Equal Employment Opportunity Commission has intervened and was permitted to participate by brief and by argument. It supports the position of the plaintiff. Defendants challenge the regulatory interpretation relied upon by the district court, 29 C.F.R. 860.120(a)(1)(1979)[1], in its decision published at 631 F. Supp. 1198 (N.D. Ohio 1986). The district court discussed this regulatory interpretation in considering "the critical factor in our determination of whether defendants' plan is the type of plan exempted [under ADEA] . . . based upon age-related cost factors." *Id.* at 1204. Not surprisingly the EEOC's brief supports its "guidelines" which it contends are in accord with its regulatory interpretation and which it asserts provides "that an employer can demonstrate that a plan provision is 'not a subterfuge' and is consistent with the Act's purpose, by showing that 'the lower level of benefits is justified by age-related cost considerations.' 29 C.F.R. 860.120(d)."

Betts filed an original complaint in this case on June 14, 1985, on the same day that she filed her charge against defendants. 29 U.S.C. § 626(d) provides, in pertinent part, that "[n]o civil action may be commenced by an individual

---

[1] 29 C.F.R. 860.120(a)(1) provides in part:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." The original complaint obviously was not in compliance with § 626(d). Plaintiff, however, filed an amended complaint of similar import on October 9, 1985, more than 60 days after the filing of her charge. We have ruled that the above 60 day provision along with 29 U.S.C § 633(b) comprise "substantive limitations on the rights of plaintiffs, . . . are analogous to statutes of limitations . . . [and] ADEA's filing and deferral provisions specify a time before which no action may be brought." *Whitfield v. City of Knoxville*, 756 F.2d 455, 461 (6th Cir. 1985). *See also Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983), *cert. denied*, 465 U.S. 1102 and 467 U.S. 1226 (1984) ("Congress intended conciliation efforts under § 626(d) to be a strict condition precedent to the initiation of any litigation in federal courts," and "an absolute period of abstention by the federal judiciary.") The contemporaneous filing of the original action together with the ADEA charge was clearly barred by § 626(d). There is a serious question as to whether plaintiff cleared this ADEA hurdle by later filing, after 60 days had expired, a similar amended complaint. The district court and the majority have not addressed this jurisdictional problem, which may be a basis for dismissal.

Plaintiff's application for disability retirement was denied under the following language of Ohio Rev. Code § 145.35:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program.

(Emphasis added.)

As observed by the district court, the defendants' disability retirement plan "provides that a retirant shall receive a

retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. *See* Ohio Rev. Code § 145.36." 631 F. Supp. at 1202. ADEA § 623(a)(1) precludes discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The district court concluded that defendants' retirement plan had a "disparate impact" upon individuals such as plaintiff despite its finding that there was no "ill will" directed towards plaintiff "or anyone in the protected group," and despite its observation that "at first glance, the plan appears to be eminently just." *Id.* at 1202. The district court conceded that such disparate impact occurred only in the situation where one sixty years or older had not accumulated sufficient "voluntary" retirement benefits by reason of length of service to attain thirty percent of final salary.

The district court also concluded that the exception under 29 U.S.C. § 623(f)(2)[2] did not apply. Giving "great deference" to EEOC guidelines, including 29 C.F.R. 860.120(f)(1)(iii),[3] the court held that because the plan denied "long term disability benefits on the basis of age," defendants could not prevail. *Id.* at 1203. Defendants' argument that its plan afforded a "legitimate retirement option," and was therefore exempted, was not specifically addressed by the district court because "even if the benefit package merely permits an age-based reduction," it was held not to be "the type of plan contemplated by the exemption." *Id.* at 1204. The district court analogized plaintiff's position of "forced retirement" to that of "constructive discharge" despite plaintiff's concession that she was faced with options to retire or be terminated because of "poor job performance" and "apparent medical problems." *Id.* at 1204. Also, because the plan did

---

[2] 29 U.S.C. 623(f)(2) provides, in part:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . .

[3] 29 C.F.R. 860.120(f)(1)(iii) provides in part:

> [W]here employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. . . .

not contain an "express provision for involuntary retirement, at the employer's option", before attaining age seventy, the district court held that defendant employer "did not observe the terms of the plan when it forced plaintiff to retire." *Id.* at 1205.

Applying Title VII criteria to this action, and citing *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976) and *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971), the district court held that PERS was an employer within the meaning of the act, although not one "in conventional terms . . . because it controls some aspects of plaintiff's compensation . . . and privileges of employment." *Id.* at 1206. Both defendants appeal the consequent grant of summary judgment to plaintiff, although PERS did not pursue on appeal the question of its employer status under ADEA.

Other courts have recently considered the interesting questions presented in this appeal. See *EEOC v. State of Maine and Maine State Retirement System*, 823 F.2d 542 (1st Cir. 1987) (affirming without opinion the district court's dismissal of an ADEA claim where members of the plan, state employees, were similarly restricted from retirement disability benefits unless permanently disabled before reaching age sixty, see *EEOC v. State of Maine, et al.*, 644 F. Supp. 223 (D. Me. 1986)). These decisions in the *State of Maine* case were not available to Judge Speigel whose opinion pre-dated them. See also *Foster v. Board of Trustees of the Maine Retirement System*, No. CV-86-24 (Maine Super. Ct. Aug. 6, 1986).

A similar result was reached in a case involving like challenge to a group life insurance program which provided disability benefits only to employees who became disabled prior to reaching age sixty. See *EEOC v. Cargill, Inc.*, No. 81-4193 (D. Kan. Oct. 12, 1984), *appeal docketed*, No. 84-2692 (10th Cir. Dec. 10, 1984). In *Cargill*, District Judge Saffels considered amended § 623(f)(2) of ADEA in light of its legislative history and concluded that the plan at issue was not a "subterfuge" and was bona fide despite the fact that

Cargill's plan had been amended after the passage of ADEA, but not in respect to the disability feature. (A similar contention is made by Betts that defendants had amended the plan in question after ADEA became effective). The district court in *Cargill* granted defendant summary judgment holding that the provision in question "was instituted in good-faith prior to the passage of ADEA."[4] See also *International Bhd. of Elec. Workers v. Union Elec. Co.*, 585 F. Supp. 261 (W.D. Mo. 1984), *aff'd* 761 F.2d 1257 (8th Cir. 1985) and *Alford v. City of Lubbock, Texas*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) for the proposition that a plan, adopted before ADEA came into effect, which might seem on its face to discriminate against older employees was deemed not to be a subterfuge within the meaning of § 623(f)(2) citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The majority does not address these cases dealing with this statutory provision.

No disparate treatment nor intentional discrimination on the part of defendants has been demonstrated in this case.[5] The court concluded rather that "defendants' disability retirement plan has a disparate impact upon individuals in the protected age group." 631 F. Supp. at 1202. The district court did note that the purpose and effect of the plan was to deny "benefits to certain employees because they are sixty years of age or older." *Id.* at 1202, citing *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). *Borden's* involved a plant closing and whether certain employees fifty-five or older were discriminatorily denied severance pay under ADEA. Two questions were presented, the first "whether Borden's policy of denying severance pay to employees eligible for retirement" violated ADEA, and the second, "whether Borden's severance pay policy qualifies

---

[4] *Cargill* has been appealed to the Tenth Circuit Court of Appeals and oral argument has been heard. No decision has yet been rendered.

[5] The district judge noted no "ill will" by reason of age demonstrated; that the plan "preserved career opportunities" and in some respects "appears to be eminently just." 631 F. Supp. at 1202.

for the 'bona fide employee benefit plan' exception under . . . 29 U.S.C. § 623(f)(2)." *Borden's*, 724 F.2d at 1392. The *Borden's* court found disparate treatment in addition to affirming the district court's disparate impact analysis because "Borden's purposefully drafted its severance pay policy," 724 F.2d at 1393, and held that there was no further need to show a discriminatory animus, citing other Ninth Circuit decisions. Such a holding necessarily examines the impact of a plan upon a particular employee or group of employees of a certain age, and implies a discriminatory animus or intent from the adoption of language in a plan that sets forth eligibility for severance benefits based upon age or length of service. The *Borden's* court acknowledged that the retirement benefits afforded the claimants were of greater value than the severance pay which was granted to employees who were not entitled, because of their younger age, to retirement benefits. The plant closing in *Borden's* brought about a *forced retirement of termination of all employees* there situated at the time of closure. That economic factors may have motivated the actions of the employer and its plan policies were deemed immaterial "since Borden is not arguing that its policy was economically necessary", *id.* at 1394. The other basis for decision in *Borden's* was that the "severance pay policy" in question was "not a 'plan'" within the meaning of § 623(f)(2), because it was a "one-time, ad hoc cash payment." *Id.* at 1395, 1396. I find *Borden's* rationale unpersuasive, and conclude that it does not apply to the very different set of circumstances involved in this case where the policy at issue is clearly that involved in an ongoing plan, not just a "one-shot, ad hoc" action outside the "meaning of § 623(f)(2)" as found in *Borden's*.

The district court concluded that the plan in question did not qualify for the § 623(f)(2) exemption because it did not meet certain of the following required criteria which it found must be established:

> (1) it must be the sort of "plan" covered by the exemption;

> (2) it must be "bona fide," which means that it exists and pays substantial benefits;
>
> (3) the defendants' act must be in observance of its plan;
>
> (4) the plan must not be a subterfuge to evade the purposes of the act.

631 F. Supp. at 1203. The district court found the plan to be a bona fide one. It was a "bona fide employee benefit plan," of the kind defined in 29 U.S.C. § 623(f)(2).

However, the district court found that the action taken with regard to Betts was akin to a constructive discharge and that this action ("involuntary retirement") was not a part of the terms of the plan, thus defendants had not "observed" the plan, another of the four criteria.

It is clear, however, that Betts was not rendering satisfactory service in the several positions in which she had been placed during her approximate five years of service. She knew that she faced the potentiality of a forced medical leave under the terms of her employment and the established policy of the defendant employer. She was given an option, on the other hand, under the plan "to voluntarily retire and continue to have medical benefits." See Stipulation #10. Betts had ten days to make a decision after being furnished information about the options available to her. Her daughter was also fully advised about the options under the plan. It was further stipulated that age was not a factor in the decision about requiring a medical examination and the potentiality of a forced medical retirement. The constructive discharge analogy is inappropriate as herein pointed out.

The fact that a "forced" medical retirement might have been one option available to Betts, due not to her age but rather her condition of health, and that another retirement option was available to her which she voluntarily chose in which the amount of benefits depended primarily upon length

of service, is the significant consideration. I would find that the retirement involved in this case was a voluntary one.

Even if there were found a discriminatory impact upon Betts, a constructive discharge analogy is simply not appropriate in this case. This is not a case of difficult, unpleasant or intolerable working conditions being imposed upon plaintiff. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991 (6th Cir. 1984).

The Board's actions as an employer did not constitute an equivalent to a "constructive discharge" of Betts; its actions were "in observance of its plan." The district court's contrary conclusion was in my view erroneous. Therefore, I would conclude that defendants did meet the criterion of observing, and not departing from, the terms of its plan.

For the reasons stated in the *Cargill* and *Maine* cases, and because the plan, when adopted and as implemented, was bona fide and not a "cover" or a scheme to discriminate by reason of age against employees in the position of plaintiff, I would further conclude that it was not a "subterfuge to evade the purposes" of ADEA. The definition of "subterfuge," in § 626(f)(2), is a "scheme, plan, strategem, or artifice of evasion" as set out in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. Since defendants' plan was adopted long before ADEA became law, it was not a subterfuge to evade old age discrimination. The third of the criteria was met in that respect.

The final criterion necessary for a plan to come within the exemption of 29 U.S.C. § 623(f)(2) is whether this was the "sort of 'plan' covered by the exemption." 631 F. Supp. at 1203. *Borden's*, a principal authority relied upon by the district court, which considered a "one shot" severance pay arrangement, has been distinguished. Another principal authority cited by the district court in finding the plan in question not to be the "sort" intended by § 623(f)(2) is *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). In *Westinghouse*, the court

concluded that the layoff income benefit denied to workers at least 55 years of age was "functionally independent of the Pension Plan," because "[t]he mere fact that benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB, however, does not merge the two plans into a single 'coordinated benefit plan.' *EEOC v. Borden's Inc.*, 551 F. Supp. 1095, 1099 (D. Ariz.) *appeal docketed*, No. 83-1701 (9th Cir. Feb. 17, 1983)." 725 F.2d at 225. *Westinghouse* is also distinguishable. In the instant case, there was a coordinated plan and policy tied to a determination of benefits which a medically disabled worker might seek. The amount of the benefit in this case was essentially tied to an employee's length of service with the employer; it obviously sought to encourage long term employment, and it was not designed to discriminate against the hiring of an older worker, as evidenced by the defendant's hiring of Betts at age 55. Defendants' retirement benefit plan is the sort of plan contemplated by 29 U.S.C. § 623(f)(2), contrary to the conclusion of the district court. See *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). *Alford v. City of Lubbock, Texas* 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) is not to the contrary because withholding of older employees' accumulated and accrued 90-day sick pay benefits is not comparable to the disability retirement plan and policy here involved.

EEOC and the district court find support for finding a violation of ADEA because of 29 C.F.R. 860.120(a)(1) and 29 C.F.R. 860.120(f)(1)(iii). Their position is that the limitation imposed upon disability retirement benefits under the plan "is not justified by significant cost considerations and therefore . . . is not the type of plan contemplated by the [§623(f)(2)] exemption.". 631 F. Supp. at 1204.

The two regulations make reference to "significant cost considerations" in order to justify "age-based reductions in employee benefits plans" or denying benefits to "employees who are disabled at older ages." The statutory exemption itself, 29 U.S.C. § 623(f)(2) sets out, in essence, only that there be a "bona fide seniority system or any bona fide employee benefit plan . . . not a subterfuge to evade the

purpose of [the Act]" and that such plan not "require or permit . . . involuntary retirement . . . because of . . . age." Under the statute the plan at issue is bona fide and not a subterfuge set up to evade ADEA. The plan did not require or make reference to age-based involuntary retirement; rather Betts was afforded a choice or option under the plan and the policy of defendants, and her benefits were less than others because of her comparative short length of employment service rather than age per se. Compare the plan in *TWA v. Thurston,* 469 U.S. 111 (1985). The plan in question did not, unlike the *TWA* plan, permit defendants involuntarily to retire Betts. It did permit a medical layoff if her state of health was insufficient to allow her to work satisfactorily, subject to medical treatment or possible curative effect of time, with right of reinstatement. The plan did not involve involuntary retirement as contended by Betts.

In sum, the plan meets the requirements of § 623(f)(2), because it is bona fide, not a subterfuge to evade ADEA, and does not involve the forced retirement of Betts, as was the situation involved in *EEOC v. Chrysler Corp.,* 733 F.2d 1183, *reh'g denied,* 738 F.2d 167 (6th Cir. 1984), another case relied upon by plaintiff. In *Chrysler,* forced retirees were not permitted to have the option available to younger employees (under 55 years old) of "layoff status." *Chrysler* held that forced retirement, imposed on older employees only, with no other option available, by reason of "economic necessity," constituted a violation of ADEA under the facts of that case. *Chrysler* involved employees with at least ten years of service. As pointed out by defendant PERS, an age and service retirement under Ohio law is granted the option of quitting retirement and returning to service with any public employer in Ohio, including, but not limited to defendant employer. See Ohio Rev. Code § 145.381. Defendants therefore, unlike the *Chrysler* and *TWA* cases, could not force Betts into permanent retirement since, under Ohio law, she could be reemployed by other State of Ohio agencies.

I conclude that neither regulation relied upon by the district court and by Betts is in accord with statutory purpose and adds a dimension, economic cost justification, not in the

statute. I agree, therefore, with *EEOC v. State of Maine, supra,* and with *EEOC v. Cargill,* that a plan of this type does come within the exemption of 29 U.S.C. § 623(f)(2), and, therefore, does not violate ADEA. This plan falls within this plain statutory exemption language without the need to analyze legislative history.[8]

Since I conclude that the plan in question does not constitute a violation of ADEA, I would set aside any award of attorney fees to Betts' counsel.

I would therefore REVERSE the decision of the district court for the reasons indicated.

---

[8] If, however, one were to examine the legislative history of the 1978 amendment, reflected in § 623(f)(2) as set out in note 2, supra, one would find that the purpose was to preclude involuntary retirement on account of age. To that extent Congress intended to overrule *United Air Lines, Inc. v. McMann,* 434 U.S. 192 (1977).

Opinion and Order of the United States District Court, Southern District of Ohio, Western Division
(Reported at 631 F. Supp. 1198)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

No. C-1-86-1108

Filed March 27, 1986

* * *

JUNE BETTS,

Plaintiff,

v.

HAMILTON COUNTY BOARD OF
MENTAL RETARDATION, et al.,

Defendants.

* * *

OPINION AND ORDER

SPIEGEL, J.:

This matter came on for consideration of the motion for summary judgment and declaratory judgment filed by plaintiff (doc. 6), memorandum in opposition by defendant Hamilton County Board of Mental Retardation and Developmental Disabilities (HCBMRDD) (doc. 10), and by defendant Public Employees Retirement System of Ohio (PERS) (doc. 11), supplement to memorandum in opposition by defendant PERS (doc. 12), reply memorandum to documents 10 and 11 by plaintiff (doc. 14), reply memorandum by defendant HCBMRDD (doc. 22), and supplementary memorandum on summary judgment by plaintiff (doc. 18). The defendants PERS and HCBMRDD have also filed their cross-motions

for summary judgment (docs. 21 and 26) to which plaintiff has filed her memorandum in opposition (doc. 28) and the defendant PERS has filed its response (docs. 29 and 30).

This is an action for lost benefits and payment of attorney fees arising out of an alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* which provides in part:

> § 623(a) It shall be unlawful for an employer
>
> —
>
> (1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

Plaintiff alleges that defendants HCBMRDD and PERS violated the above-quoted section of the ADEA by compelling plaintiff to involuntarily retire by denying her disability retirement benefits because of her age.

Defendants make the following assertions in their responses to plaintiff's motion for summary judgment and in their own motions for summary judgment. First, defendants maintain that plaintiff voluntarily retired in June 1985 and that such voluntarily retirement precludes an action for age discrimination. Defendants argue plaintiff voluntarily chose to retire instead of undergoing a medical examination to prove the need for placing her on a medical leave of absence and therefore, age was not a factor in the events giving rise to this litigation. Second, defendants maintain that even if plaintiff was discriminated against on the basis of age, its practice of denying disability retirement benefits to individuals sixty-years of age and over was consistent with the laws and regulations in effect in June 1985, that the disability retirement plan pre-existed the promulgation of the ADEA, and such discrimination is permissible under 29 U.S.C. § 623(f)(2) which provides:

> It shall not be unlawful for an employer, employment agency or labor organization —
>
> . . . (2) to observe the terms of . . . any bona fide employee benefits plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall . . . permit the involuntary retirement of any individual [40 years of age but less than 70 years of age] because of the age of such individual . .

Finally, defendant PERS maintains that it is not an "employer" for the purposes of the ADEA, and therefore, cannot be held accountable for any discriminatory practices.

In considering a motion for summary judgment, the narrow question we must decide is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied*, 444 U.S. 986 (1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.*, quoting Rule 56(c), Fed. R. Civ. P. Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.*

For purposes of the cross-motion for summary judgment, the following facts were stipulated. In addition, the parties have fully briefed the issues, provided the Court with the applicable sections of the Ohio Revised Code setting forth the public employee retirement system at issue, and have presented their positions through oral arguments before the Court.

Plaintiff was sixty-one years of age and a six-year member of PERS when she was denied disability retirement benefits. For approximately five years, plaintiff was employed as a speech pathologist for defendant HCBMRDD. In 1984, plaintiff was not satisfactorily performing her duties as a speech pathologist and voluntarily accepted a transfer to the Beckman Adult Center to be employed as a workshop specialist. By September 1984, plaintiff was unable to satisfactorily perform her new job duties, apparently due to medical reasons. As a result, she voluntarily accepted a position as a Teachers' Aid with defendant HCBMRDD at a lower salary. By late May 1985, plaintiff's apparent medical problems continued and she was unable to perform her duties as a Teachers' Aid. At that time, HCBMRDD supervisory staff advised plaintiff that she could choose to voluntarily retire within ten days or they would begin steps to force her to take a medical leave of absence. Voluntary retirement would provide plaintiff with $139.14 per month income and continued medical benefits, while forced medical leave was without pay or medical benefits.

Subsequently, plaintiff's daughter contacted HCBMRDD and inquired about the possibility of her mother obtaining disability retirement benefits. She was told that the defendant PERS should be contacted, as it alone makes the determination of eligibility for disability retirement. On June 3, 1985, plaintiff met with HCBMRDD personnel and reviewed the only options available to her; that is voluntary retirement or forced medical leave. That same date, she signed a letter stating her intention to retire. Eleven days later, plaintiff filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the defendants.

Shortly thereafter, plaintiff filed with HCBMRDD her application for disability retirement, a report of her attending physician indicating that she was permanently disabled, and a letter requesting HCBMRDD to disregard her letter of June 3, 1985. Plaintiff's application for disability retirement was denied pursuant to Ohio Rev. Code § 145.35 which provides in part:

> Medical examination for disability retirement; reinstatement of persons not disabled.
>
> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

The disability retirement plan provides that a retirant shall receive a retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. See Ohio Rev. Code § 145.36. Moreover, a disability retirant retains his membership status in PERS and is considered on leave of absence from his position during the first five years on the retired list. Within that period, he can be restored to his previous position and salary or to a similar position and salary. Ohio Rev. Code § 145.39. Had plaintiff qualified for disability retirement, she would have received $355.02 per month based upon thirty percent of her final average annual salary of $14,260.00 and would have been eligible for reinstatement at a comparable salary and position within the first five years of retirement in the event her disability ceased. To the contrary, plaintiff is receiving $158.50 per month on "voluntary retirement", based upon her six years of membership in the PERS and is ineligible for regular re-employment in any capacity pursuant to the voluntary and compulsory retirement provisions of Ohio Rev. Code § 145.32.

The ADEA forbids an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). There are two methods of proving age discrimination. The most easily understood type of discrimination is "disparate treatment" which is evident when the employer treats some people less favorably than others because of their age. In a disparate treatment case, proof of discriminatory motive is critical. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). A second method of proving age discrimination is by demonstrating that the use of a facially neutral employment practice or the use of subjective criteria had a disparate impact on individuals in the protected age group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Intent need not be shown in a discriminatory impact case. *International Brotherood of Teamsters v. United States*, 431 U.S. 324 (1977).

We conclude that defendants' disability retirement plan has a disparate impact upon individuals in the protected age group. On its face and in its effect, the disability retirement plan denies benefits to certain employees because they are sixty years of age or older and we may assume that the plan was purposefully drafted to have that effect. *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1983). That is not to say, nor do we find any evidence in the record, that there was any ill will on the part of the defendants toward plaintiff or anyone in the protected group because of their age. In that respect, we find that this is a difficult case. It may well be that the plan was designed to discriminate on the basis of length of services rather than upon age. For example, a sixty-year-old individual with thirty years of service, who would not be eligible for disability retirement benefits, may receive higher monthly benefits and fair better than a younger individual collecting disability retirement, based upon his accumulated voluntary retirement benefits. At first glance, the plan appears to be eminently just, as it provides disability benefits to those younger individuals who become permanently disabled and who would otherwise have no source of income during their disability. It also preserves

any career opportunities an individual has obtained through his employment during the first five years of his disability. In addition, a sixty-year-old permanently disabled individual, who has served the public for many years, would be sufficiently compensated through voluntary retirement. However, these virtues of the plan are diminished when similarly situated individuals, but for their age, are compared. For example, the plan discriminates between a fifty-nine-year-old or twenty-five-year-old permanently disabled individual with six years of service and a person sixty years of age or older with an identical disability, average annual salary, and length of service, because they would not receive identical monthly benefits or the option of returning to work if their disability ceases. The discrepancy in monthly benefits and lack of opportunity to return to work is based solely upon age, as the sixty-year-old individual is precluded from seeking the option of disability retirement. The important factor in our analysis is the disparate impact that defendants' disability retirement plan has upon individuals, such as plaintiff, who are in the protected age group and who have not accumulated sufficient retirement benefits to compensate for the denial of disability benefits, based solely upon their age. In that regard, the plan is discriminatory on the basis of age.

The foregoing conclusion, however, does not resolve the question before us, as some types of age discrimination are permissible under the ADEA. Our second inquiry is whether defendants' disability retirement plan qualifies for the "bona fide employee benefits plan" exception under the ADEA, 29 U.S.C. § 623(f)(2), which provides:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . . .

In order for defendants' plan to qualify under the exemption, it must been the following four criteria: (1) it must be the sort of "plan" covered by the exemption; (2) it must be "bona fide," which means that it exists and pays substantial benefits; (3) the defendants' act must be in observance of its plan; (4) the plan must not be a subterfuge to evade the purposes of the act. Finally, even if defendants' plan meets the four criteria, it may not "require or permit involuntary retirement of any such individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2).

A plan qualifies under the exemption if it is a retirement, insurance, or pension plan. However, that list is not exclusive. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Retirement, pension, and insurance are merely examples of the types of plans in which Congress intended to allow age distinctions. *EEOC v. Westinghouse Electric Corporation*, 725 F.2d 211, 224 (3d Cir. 1983). Contrary to complex, ongoing benefit schemes, simple fringe benefits such as severance pay policies, *see EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), lay-off insurance and benefits, *see EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 211, and payment for accrued unused sick leave, *see Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982), are not excepted under the exemption. *See also* 29 C.F.R. 860.120(a)(1). Moreover, the EEOC guidelines specifically prohibit denial of long term disability benefits

on the basis of age. 29 C.F.R. 860.120(F)(1)(iii).[1] Such an administrative interpretation of the ADEA is entitled to great deference. *Griggs*, 401 U.S. at 433. We find that the "disability retirement" plan in question here is difficult, at best, to categorize. On the one hand, defendants point out that their disability retirement plan continues indefinitely, and therefore, they argue, it is a legitimate retirement option, specifically exempted from the ADEA. On the other hand, we cannot ignore the fact that defendants' plan has the salient features of a disability plan, as a disability retirant must be permanently disabled or presumed to be permanently disabled and may be restored to his former position and salary if his disability ceases within five years. In essence, the disability retirant is considered on leave of absence for the first five years of his retirement. Ohio Rev. Code §§ 145.35 and 145.39. We find it unnecessary to determine whether the plan in question is a disability plan, excepted from the exemption, or whether it is a retirement plan, specifically covered by it. The critical factor in our determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors, as set forth in the regulatory interpretation of that section.

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply for

[1] 29 C.F.R. 860.120(F)(1)(iii) provides in part:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section . . . .

> example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

29 C.F.R. 860.120(a)(1).

Plaintiff argues that the exemption does not apply because the plan does more than reduce benefits, as individuals at a certain age are precluded from receiving disability retirement benefits altogether, and in any event, such "reductions" are not based upon significant cost considerations. Plaintiff argues that contrary to insurance and pension plans, it would cost no more to provide disability benefits to a sixty-one-year-old employee than a twenty-five-year-old employee, provided both had the same number of service years and final average salary. Indeed, a twenty-five-year-old retirant would receive much more in the way of monetary benefits over his lifetime than one who became disabled at sixty-one.

As to plaintiff's first argument, we are uncertain whether defendants' benefit package, when taken as a whole, does more than permit an age-based reduction in employee benefits. While persons sixty years of age and older are precluded from disability benefits, they are eligible for voluntary retirement. However, we do not reach that issue because we agree with plaintiff that even if the benefit package merely permits an age-based reduction, it is not justified by significant cost considerations and therefore, it is not the type of plan contemplated by the exemption.

As to the second requirement for qualifying for the exemption, an employee benefits plan is bona fide if it exists and pays substantial benefits. *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980). If defendants' plan

was the type of plan exempted by section 4(f)(2), we would have little difficulty concluding that it was bona fide.

However, we conclude that other requirements were not met because defendants' act was not in observance of the plan and the plan impermissibly requires or permits involuntary retirement on the basis of age. For purposes of our analysis, these two factors are closely related. Defendants contend that the central question in this litigation is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a factor in the actions taken by HCBMRDD against her personally. The thrust of their argument is that plaintiff was given the option of voluntary retirement or a medical leave of absence, solely because of her poor job performance due to apparent medical problems. Plaintiff does not dispute that fact. However, central to plaintiff's argument, and of utmost importance to our analysis, is the impact that defendants' disability retirement plan has upon individuals such as plaintiff who are in the protected age group. Because of plaintiff's age, she was presented with two options rather than three. Those options were "voluntary retirement" or forced medical leave. The former option provides retirement and medical benefits. The latter option provides neither. We conclude that the situation is analogous to constructive discharge which arises when working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. *See Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir. 1977). In essence, plaintiff was presented with a choice of early retirement or nothing (a livelihood or none), and we therefore conclude that plaintiff was forced into retirement because of her age.

In 1978, section 623(f)(2) was amended in part, to include the following language:

> and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

> 29 U.S.C. § 623(f)(2) as amended, Pub. L. 95-256 § 2(A), Apr. 6, 1978, 92 Stat. 189.

The amendment to the ADEA, forbidding forced early retirement in essence overruled the Supreme Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a bona fide plan, even if the sole basis for early retirement is age. *See EEOC v. Chrysler Co.*, 733 F.2d 1183, 1185 (6th Cir. 1984). We conclude that the amendment should be applied to this case because plaintiff retired in 1985 and we are to apply the laws as it stood when the controversy arose. *Carpenter*, 635 F.2d at 580. Having concluded that the plan requires or permits the involuntary retirement of an individual because of his age, we need not address the issue of whether or not the plan is a subterfuge to evade the purposes of the ADEA.

However, we note that even if this controversy had arisen prior to the 1978 amendment, the exemption would not apply because defendants did not act in observance of the plan. Congress' intent in enacting section 4(f)(2) was to permit involuntary termination only if the employee benefit plan specifically provides for it. *Sexton v. Beatrice Foods, Co.*, 630 F.2d 478 (7th Cir. 1980).

> [A]n employer does not observe the terms of the plan unless the plan expressly sanctions the decision to force the employee to retire early as well as the decision to pay him substantial benefits. Both of these decisions must be pursuant to some express provision in the plan if the employer wishes to claim that he observed the terms of the plan by forcing an employee to retire early.

Id. at 486.

Under the PERS, the normal retirement date is the thirtieth day of June of any year a member of the system has attained the age of seventy. A member who has passed his sixtieth

birthday and has five or more years of total service credit, may elect early retirement. However, the PERS does not contain an express provision for involuntary retirement, at the employer's option, before an employee attains the age of seventy. Therefore, the employer did not observe the terms of the plan when it forced plaintiff to retire.

For the foregoing reasons, we conclude that the disability retirement plan conflicts with, and is in violation of the ADEA. In 1974, the ADEA was amended to extend coverage to state and local employees.[2] In *EEOC v. Wyoming*, ____ U.S. ____, 103 S. Ct. 1054 (1983), the Supreme Court held that the extension of the ADEA to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause and is not precluded by the Tenth Amendment. *Id.* To the extent that the 1978 ADEA amendments conflict with existing state statutes, the Supremacy Clause dictates that federal law prevail. *Orzell v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 752 (7th Cir. 1983).[3]

Finally, we must determine whether PERS is an "employer" within the meaning of the ADEA, and therefore, can be held liable for discriminatory practices on the basis of age. PERS

---

[2] *See, e.g.*, H.R. Rep. No. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2850 ("The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment."); 120 Cong. Rec. 8768 (1974) (remarks of Senator Benson) ("The passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector.").

[3] *See also* 29 C.F.R. § 1625.6(c) (1981 Supp.):

> Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the Act.

argues that it cannot be defined as an employer because it is independent of HCBMRDD and is only involved to the extent that it receives county contributions to the public employees retirement system pursuant to Ohio Rev. Code § 145.48.

The ADEA, *inter alia*, prohibits employers from discriminating on the basis of age. Employer is defined to include a person engaged in an industry affecting commerce employing a specified number of employees for a specified period of time, and any agent of such person. 29 U.S.C. § 630(b). Plaintiff asserts that criteria employed in determining liability under Title VII of the 1964 Civil Rights Act should be applied to cases arising under the ADEA. In *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976), our parent circuit noted that the "ADEA is an offspring of the Civil Rights Act of 1964" and that "[t]he prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964, except that 'age' has been substituted for 'race, color, religion, sex or national origin.' . . ." and therefore, "[A]n analogous application of such standards should not be disregarded." *Id.* at 686 (citations and footnotes omitted). Accordingly, we conclude that adopting the Title VII criteria for purposes of this case is appropriate.

The Sixth Circuit has held that "Title VII . . . should not be construed narrowly." *Tipler v. du Pont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). For purposes of Title VII, the term "employer" "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." *Spirit v. Teachers Insurance and Annuity Assoc.*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979). *See also EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256

(N.D. Ohio 1981).[4] In this case, defendant PERS does not deny that it is vested with the general administration and management of the Public Employees Retirement System and that it denied plaintiff's application for disability retirement in accordance with the provisions of Ohio Rev. Code § 145.35. Therefore, we conclude that PERS is an employer for purposes of the ADEA because it controls some aspects of plaintiff's compensation, terms, conditions, and privileges of employment.

Accordingly, plaintiff's motion for summary judgment and declaratory judgment (doc. 6) is granted, the cross-motions for summary judgment by defendant PERS (doc. 21) and by defendant HCBMRDD (doc. 26) are denied.

This matter is set for a status conference on May 2 at 3:00 P.M., 1986 to discuss further proceedings consistent with this opinion.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

---

[4] *See Cannon v. State of Delaware*, 523 F. Supp. 341 (D.Del. 1081) (Personnel Commission may be held liable under Title VII as agent of state, responsible for supervising the operation of the merit system); *Hannah v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981) and *Probe v. State Teachers' Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981) (State Teachers' Retirement Systems held to be employers of contributors or members for purposes of Title VII.

NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 86-3676

JUNE M. BETTS,
Plaintiff-Appellee,

v.

HAMILTON COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,
AND
PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Public Employees Retirement System, a defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit, entered June 3, 1988, affirming the decision of the district court.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

ANDREW I. SUTTER
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

Counsel for Defendant-Appellant
Public Employees Retirement
System of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by regular U.S. mail, postage prepaid, this _____ day of August, 1988, to Robert F. Laufman, Laufman, Rauh & Gerhardstein, 1409 Enquirer Building, 617 Vine Street, Cincinnati, Ohio 45202, and Thomas E. Deye, Assistant Prosecuting Attorney, 420 Hamilton County Courthouse, Cincinnati, Ohio 45202.

ANDREW I. SUTTER
Assistant Attorney General

TEXT OF STATUTES INVOLVED

29 U.S.C. Section 623(a)(1) and (f)(2)

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age[.]

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization - . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

Ohio Revised Code Section 145.35

Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program. Application must be

made within two years from the date the member's contributing service terminated, unless the disability has existed in some degree as evidenced by medical records, before the member's contributing service was terminated. Application may not be made by or for any person receiving age and service retirement benefits under section 145.33, 145.34, or 145.37 of the Revised Code or any person who, pursuant to section 145.40 of the Revised Code, has been paid the accumulated contributions standing to the credit of his individual account in the employees' savings fund. The application shall be made on a form provided by the public employees retirement board. Any member who is approved for disability retirement shall be placed on retirement as of the first day of the month immediately following the later of:

(A) The last day for which compensation was paid; or

(B) The attainment of eligibility for benefits provided under this section.

Medical examination of a member who has applied shall be conducted by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent. The disability must have occurred since last becoming a member or have increased since last becoming a member to such extent as to make the disability permanent or presumed to be permanent.

If the physician or physicians determine that the member qualifies for retirement by reason of disability, and the board concurs with such determination, the member shall be retired for disability and the action of the board shall be final.

In the event an employer files a disability retirement application to retire a member on disability retirement as a result of his having been separated from service because he is considered to be mentally or physically incapacitated

for the performance of his present duty, and the physician or physicians selected by the board reports to the board that the member is physically and mentally capable of performing service similar to that from which he was separated and the board concurs in the report, the board shall so certify to the employer and the employer shall restore the member to his previous position and salary or to a similar position and salary.

TEXT OF REGULATIONS INVOLVED

29 C.F.R. 860.120(a)(1) and (f)(1)(iii)

(a)(1) The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, [29 U.S.C. § 623(f)(2)] does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in [29 U.S.C. § 623(f)(2)], benefit levels for older workers may be reduced to the extent necesary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

(f)(1)(iii) [W]here employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to

employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OCT 4 1988

No. 88-389

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

MOTION TO PROCEED IN FORMA PAUPERIS

The appellee, June M. Betts, asks leave to file the attached Motion to Affirm, without prepayment of costs and to proceed in forma pauperis.

Appellee has not sought to proceed in forma pauperis in the courts below. In 1985, appellee paid $100.00 to cover filing fee and expenses and has made no further payments.

Appellee is divorced, has Altzheimer's disease and has been in a full-care nursing home since April 1987 with expenses of $2,127.00 per month and income of only $863.26. The Affidavit of Andrew R. Betts, attorney-in-fact for appellee, in support of this motion is attached hereto.

ROBERT F. LAUFMAN
(Counsel of Record)
ALPHONSE A. GERHARDSTEIN
Laufman, Rauh & Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

No. 88-389

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

AFFIDAVIT OF ANDREW R. BETTS

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

I, Andrew R. Betts, being first duly sworn according to law, depose and say:

1. I am the son, next of kin and duly appointed attorney-in-fact pursuant to a Power of Attorney dated April 14, 1987, attached hereto as Exhibit A, of June M. Betts, appellee in the above-entitled case.

2. I state that I am in a position to know the nature and extent of all of appellee's property, obligations and expenses and based upon my knowledge of appellee's business and financial affairs, because of her poverty, appellee is not able to pay the costs of said case or to give security; and that as her attorney-in-fact and next of kin, I believe appellee to be entitled to redress.

3. Appellee has been diagnosed as having an incurable Altzheimer's related disorder that prevents her from comprehending the nature of her financial and business affairs. At present she is bedridden and confined to a full-care nursing home.

4. Since my appointment I have attended to all of appellee's business and financial affairs and believe the following are all of the facts pertinent to the question of her ability to pay the costs and expenses of the proceedings and to give security.

5. Appellee has not been employed since June 1985. At the time her employment was terminated she was earning less than $1,000 per month.

6. Within the past twelve months, appellee has not received any income from a business, profession, or other form of self-employment, or in the form of rent payments.

7. At present, Appellee's monthly expenses exceed her monthly income by $1,963.74 each month. Income and expenses are as follows:

Source	Monthly Income	
PERS Disability Retirement	$163.26	
Alimony (To be reduced upon retirement of former husband)	$700.00	
Total Income		$863.26

Expense	Monthly Expense	
Arbors of Milford (Nursing Home)	$2077.00	
Misc. Expenses	$ 50.00	
Total Expense		$2127.00

8. Appellee owns no real estate, automobile, or other valuable property.

9. Appellee has the following assets:

$3,742.00	Ameritrust IRA (face value, subject to early withdrawal penalty and taxes.
$2,860.00	Merrill Lynch IRA (face value, subject to early withdrawal penalty and taxes.
$ 984.39	Phoenix Mutual Life Insurance Policy (cash value as of September 30, 1988)
$2,254.70	Star Bank Checking Account (9-15-88)
$13,338.60	1,034 shares in the Puritan Fund. Dividends are automatically reinvested. Value as of 9-15-88.

10. Based on current expenses and current income, I estimate that the Puritan Fund and the Star Bank checking account will be exhausted within 12 months and the remaining assets will be exhausted in another 5 months. At that point she will be destitute.

11. I have recently learned that Appellee may be eligible for social security benefits equal to 35% her former husband's social security benefits. I have applied for these benefits but have been unable to learn the amount. The benefits are not expected to be high as her former husband is a minister with little taxable income. I have also located and will apply for an annuity with TIAA which will pay $94.00 per month.

12. Appellee is unmarried and has no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Andrew R. Betts

Sworn to and subscribed in my presence this ____ day of September, 1988.

Notary Public

1

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

THAT I, JUNE M. BETTS, 952 Lenox Place, Cincinnati Ohio 45229, County of Hamilton, State of Ohio, have made, constituted and appointed, and by these presents do make, constitute my son, ANDREW R. BETTS for me and in my name, place and stead,

To take custody of and receive, deposit, withdraw and/or disburse any and all financial accounts and funds which I own or may receive, to determine and pay my current obligations and to handle my finances for my best interest. To sign checks and enter contracts on my behalf and enforce same.

To take custody of and assume full control over all of my personal property including any and all stocks, bonds and other certificates of investment in my name as I might do myself.

In the event that I am unable to take part in decisions for my own future, I further authorize my said attorney in fact to make any necessary determination on my behalf as to necessary or desirable medical treatment or the lack thereof, and to grant such consents therefor as may be appropriate.

In the event that a Court of competent jurisdiction determines that a guardian of my person or property is necessary or desirable, I hereby nominate and request the Court to appoint my said attorney, ANDREW R. BETTS, to serve without bond.

I hereby give and grant unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute shall lawfully do or cause to be done by virtue hereof. This Power of Attorney shall not be affected by disability of the principal, in accordance with O.R.C. 1337.09.

A photostatic copy of this document, delivered by me or by my said attorney to any third party will be conclusive to such third party that this Power of Attorney has not been terminated and will continue in effect until such third party is advised by written notice from me or my said attorney of such termination. The attorney shall keep a record of all such third parties and shall advise them upon its termination.

IN WITNESS WHEREOF, I have hereunto set my hand this 12 day of April 1987.

Signed and acknowledged in presence of:

June M. Betts
JUNE M. BETTS

STATE OF OHIO COUNTY OF HAMILTON ss:

BE IT REMEMBERED, That on this 12 day of April, 1987, before me, a Notary Public in and for said County, personally appeared the above named JUNE M. BETTS, who acknowledged that she did sign the foregoing instrument and that the same was her voluntary act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, on the day and year last above mentioned.

No. 88-389

In the
SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

On Appeal From
The United States Court of Appeals
For the Sixth Circuit

MOTION TO AFFIRM

ROBERT F. LAUFMAN
(Counsel of Record)
ALPHONSE A. GERHARDSTEIN
Laufman, Rauh & Gerhardstein
1409 Enquire Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

MOTION TO AFFIRM..... 1

STATUTES INVOLVED..... 1

STATEMENT OF THE CASE..... 1

THE QUESTION PRESENTED IS NOT SUBSTANTIAL..... 2

A. The Sixth Circuit Was Correct In Holding Pre-ADEA Plans Must Show Substantial Business Purpose 3

B. This Is Not The Case To Resolve The Question Raised By Appellant 4

C. Depriving Betts of Disability Benefits Resulted In Involuntary Retirement 5

D. A Long-Term Disability Plan Is Not The Type Of Plan Exempted Under 29 U.S.C. § 623(f)(2) of the ADEA. 6

E. Even If § The 623(f)(2) Exemption Applies, Post-ADEA Modifications Convert A Pre-existing Plan Into A Subterfuge 9

SUMMARY 10

CONCLUSION..... 11

APPENDIX..... A-1

TABLE OF AUTHORITIES

Cases **Page**

Alford v. City of Lubbock, Tex.,
664 F.2d 1263 (5th Cir. 1982) 8

Cipriano v. Board of Educ. of City School Dist.,
785 F.2d 51 (2nd Cir. 1986) 8, 9

E.E.O.C. v. Baltimore and Ohio R. Co.,
632 F.2d 1107 (4th Cir. 1980) 9

E.E.O.C. v. Borden's Inc.,
724 F.2d 1390, (9th Cir. 1988) 3, 8

E.E.O.C. v. Cargill,
___ F.2d ___, 47 F.E.P. Cases 1122
(10th Cir. 1988) 4, 9

E.E.O.C. v. City of Mt. Lebanon, Pa.,
842 F.2d 1480 (3rd Cir. 1988) 8

E.E.O.C. v. Orange County,
837 F.2d 420 (9th Cir. 1988) 4, 9

Karleen v. City Colleges of Chicago,
837 F.2d 314 (7th Cir. 1988) 8

Sikora v. American Can Co.,
622 F.2d 1116 (3rd Cir. 1980) 9

Smart v. Porter Paint Co.,
630 F.2d 490 (7th Cir. 1980) 9

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 6

United Air Lines, Inc. v. McMann,
434 U.S. 192 (1977) 3, 4, 9

Statutes

29 U.S.C. § 623(f)(2) ..... passim

Ohio Revised Code § 145.32 6

Ohio Revised Code § 145.36 10

Ohio Revised Code § 145.39 5

Regulations

29 C.F.R. § 810.120(a)(1) 7, 8

29 C.F.R. § 810.120(f)(1)(iii) 7, 8

Miscellaneous

H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8 4

No. 88-389

In the

SUPREME COURT of the UNITED STATES

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Appellant,

v.

JUNE BETTS, Appellee.

MOTION TO AFFIRM

The appellee, June M. Betts, respectfully moves the Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit because it is manifest that the federal question presented is so unsubstantial as not to need further argument.

STATUTES INVOLVED

The statutes involved are set forth in Appellant's Appendix (A-38) and herein at A-1. The federal regulations involved are set forth in Appellant's Appendix (A-40).

STATEMENT OF THE CASE

In 1985, June Betts ("Betts"), at age 61 was diagnosed as having possible Altzheimer's disease. Her employer, Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB"), informed her that if she did not apply for length of service retirement ("regular retirement") with the Public Employees Retirement System ("PERS"), HCB would initiate forced medical leave and she would receive neither pay nor medical benefits. HCB advised Betts that she was not eligible for disability benefits because she was over 60 years of age. Betts was thus forced into regular retirement. As a regular retiree Betts received only $158.50 per month. Her age made her ineligible for disability benefits which would have paid her $355.02. per month. This difference in benefits to retirees

based on age stems from a post-ADEA amendment to the PERS disability plan (Appendix A-1). The amendment provided that a minimum benefit of 30% of final average salary (FAS) would be paid for disability benefits. No such minimum was set for regular retirement. Betts then applied for regular retirement.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Appellant asks this Court to consider whether age based distinctions in bona fide employee benefit plans, including plans promulgated prior to the passage of the ADEA, must be justified by a substantial business purpose. On that issue, the Sixth Circuit correctly held that discriminatory provisions need a business justification under the ADEA (Section A below).

There are four reasons, however, why the question presented is too unsubstantial to justify further argument before this Court.

1. Contrary to Appellant's claim, only the Sixth, Ninth, and Tenth Circuits are in conflict on the issue of whether a bona fide employees benefit plan promulgated prior to the passage of the ADEA must be justified by a substantial business purpose. Since this case should be decided without reaching this issue, this Court should wait until the issue is presented in a subsequent case following further development in the circuits. (Section B, below)
2. The PERS benefit plan, by denying Betts the option of applying for disability benefits, forced her into involuntary retirement in violation of the ADEA. Even plans that are exempt under § 623(f)(2) may not permit involuntary retirement. (Section C, below).
3. The PERS disability plan is not the type of employee benefit plan exempted by § 623(f)(2). The exemption applies only to those plans in which cost increases with the age of the employee. There is no cost

justification available to PERS in this case. (Section D, below).

4. Even if the § 623(f)(2) exemption applies, the PERS disability plan is defective because there were significant modifications which made the plan discriminatory after passage of the ADEA. The circuits are in complete agreement that significant or relevant changes in a benefit plan after the passage of the ADEA may convert the plan into a subterfuge. (Section E, below).

A. The Sixth Circuit Was Correct In Holding Pre-ADEA Plans Must Show Substantial Business Purpose

It is undisputed that the PERS disability plan discriminates on the basis of age. However, PERS maintains that the plan is exempt from the ADEA under § 623(f)(2). Under this affirmative defense, PERS must meet four criteria: 1) It must be the sort of "plan" covered by the section. 2) It must be "bona fide", which has been held to mean that the plan exists and pays substantial benefits. 3) PERS must have acted in observance of its plan and 4) The plan must not be a subterfuge to evade the purposes of the ADEA. See, E.E.O.C. v Borden's Inc., 724 F.2d 1390, 1395 (9th Cir. 1984).

The PERS disability plan fails to meet three of the above criteria. The plan is not the type covered by § 623(f)(2) (Section D, page 6 below), the plan is not "bona fide" because it permits forced retirement (Section C, page 5 below) and does not pay substantial benefits, and the plan is a subterfuge (Section E, page 9 below).

PERS ignores these criteria and argues that establishment of a discriminatory employee benefit plan prior to passage of the ADEA is a total defense and nothing more need be proved. Their argument focuses only on the definition of "subterfuge" under the Act. In United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977),

this Court held that a retirement plan that predated the ADEA was not a subterfuge of the ADEA even if it permitted involuntary retirement based upon age. Congress amended the ADEA in 1978 to reverse McMann. Applying the amended Act in this case, the Sixth Circuit held that the 1978 amendment to the ADEA clearly required that age-based discrimination within a benefit plan must be justified by a substantial business purpose. In so holding, the Sixth Circuit relied upon the language in the Conference Report on the 1978 Amendments:

> Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments. (emphasis supplied).

H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 529.

The Sixth Circuit was correct in holding that the PERS disability plan is unlawful because it can not be justified by a substantial business purpose.

B. This Is Not The Case To Resolve The Question Raised By Appellant.

This is not the case to resolve the question raised by Appellant as only three circuits have ruled on this issue. Contrary to Appellant's claim, only the Ninth and Tenth Circuits have adopted a position opposite to that of the Sixth Circuit in respect to the proper interpretation of the effect of the 1978 amendment. See, E.E.O.C. v. Orange County, 837 F.2d 420 (9th Cir. 1988) and E.E.O.C. v. Cargill, ___ F.2d ___, 47 F.E.P. Cases 1122 (10th Cir. 1988). Subterfuge was the only issue in Orange County and Cargill. The Sixth Circuit decided this case on other issues as well and its decision should be affirmed.

Furthermore, none of the other circuit court decisions cited at page 8 of Appellant's Jurisdictional Statement discuss the effect of the 1978 Amendment on this Court's decision in McMann. This issue is not sufficiently framed by the circuits below to merit Supreme Court attention.

PERS claims this case is significant because it is the nations's seventeenth largest pension system. While PERS may be large, the impact of this case is minuscule. This case only affects employees who are disabled after they reach age 60 and have less than 15 years of service (employees disabled before age 60 continue to receive disability benefits after age 60, employees who have more than 15 years service generally receive more than 30% FAS). When employees who are disabled after age 60 with less than 15 years service are compared to all other categories, their number pales into insignificance.

Moreover, as set out below, this case has other dispositive issues making Supreme Court attention to the question raised by appellant unnecessary at this time.

C. Depriving Betts of Disability Benefits Resulted In Involuntary Retirement.

Even pre-ADEA bona fide employee benefit plans may not require or permit involuntary retirement. In 1978, Congress amended § 623(f)(2) by adding

> no ... [bona fide] seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 70] because of the age of such individual.

PERS' § 623(f)(2) defense is not available if the plan causes or permits involuntary retirement. Even employee benefit plans which would normally be exempt under § 623(f)(2) are not exempt from the provisions of the ADEA if the plan has the effect of causing involuntary retirement.

Disabled retirees under PERS are on leave of absence from their positions for the first five years and may return to their place of employment.[1] Regular retirees, on the other hand, are ineligible for regular employment in any capacity of public

---

1. O.R.C. § 145.39 provides: "A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter."

service.[2] Thus forcing disabled employees to retire also causes them to lose reemployment rights should they become able to work again.

This court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), applied the 1978 amendment and held that by depriving TWA pilots of the option of transferring to flight engineer, an option that was available to younger pilots, the TWA seniority system forced involuntary retirement in violation of § 623(f)(2). Likewise, by depriving Betts the option of disability benefits, an option that was available to younger employees, the PERS disability plan forced involuntary retirement in violation of § 623(f)(2).

As the district court below recognized, plaintiff was presented with a choice of early retirement or nothing (a livelihood or none) and therefore plaintiff was forced into retirement because of age. The Sixth Circuit agreed, describing the effect of the disability plan as "forcing length of service retirement." (Appellant's Appendix A-5).

D. A Long-Term Disability Plan Is Not The Type Of Plan Exempted Under 29 U.S.C. § 623(f)(2) of the ADEA.

Not all employee benefit plans are exempt under § 623(f)(2) of the ADEA. Congress qualified the words "bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan." It suggests that Congress meant to exempt only certain benefit schemes from the ADEA. The legislative history makes it clear that only those benefit plans in which the cost of benefits increased with age were to be exempt.

The cost of certain benefits such as life insurance, retirement plans, and pension plans is greater for newly hired older workers than for other employees. Recognition of this fact

---

2. O.R.C. § 145.32 provides: "Any [regular retiree] who accepts an allowance under Chapter 145. of the Revised Code . . . is ineligible for regular re-employment in any capacity which comes within Chapter 145. of the Revised Code."

spurred Senator Javits to propose an amendment that created the "bona fide benefit plan" exemption of § 623(f)(2).

Pursuant to 29 U.S.C. § 628, the Department of Labor, in 1969 and 1979 issued regulations interpreting the ADEA (29 C.F.R. § 810.120). In 1979, responsibility for enforcement of the ADEA was transferred to the E.E.O.C. which adopted 29 C.F.R. § 810.120 and which it later redesignated 29 C.F.R. § 1625.10. The relevant parts of this C.F.R. are reprinted at page A-40 in Appellant's Jurisdictional Statement. Since 1969, these regulations interpreting the ADEA have consistently held that the § 623(f)(2) defense is available only to employee benefit plans in which benefit reductions are justified by significant cost considerations.

While the cost of insurance, retirement and pensions plans are age-related, i.e. costs increase with age, this is not true of the PERS disability plan. To the contrary, the PERS disability plan would seem to cost more for younger employees than for older employees. An employee who becomes disabled at age 23 could receive disability benefits for the remainder of his life (employees who become disabled before age 60 continue to receive disability benefits after age 60). Considering the longer life expectancy of the younger employee, it is likely to cost the employer more for the younger disabled employee because he will draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older.

Long term disability plans were clearly not intended by Congress to be exempted from the ADEA. The Labor Department and E.E.O.C. properly interpreted the legislative intent in 29 C.F.R. § 860.120(f)(1)(iii) [now 29 C.F.R. § 1625.10(f)(1)(iii)] which states:

> where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages.

In this case, one of the reasons the Sixth Circuit rejected PERS' § 623(f)(2) defense was that the cost of a long term disability plan did not increase with the employee's age. Relying upon E.E.O.C. Regulations and the legislative history, the Sixth Circuit stated:

> the district court noted that the "critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors as set forth in the regulatory interpretation of that section" 631 F.Supp. 1198, 1204 (S.D. Ohio 1986). See 29 C.F.R. 860.120(f)(1)(iii). We Agree.

[Appellant's Appendix, page A-4]. The Sixth Circuit's decision is in complete agreement with all circuit court decisions and the E.E.O.C. regulations. See Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 54 (2nd Cir. 1986), E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1489, 1493 (3rd Cir. 1988), Alford v. City of Lubbock, Tex., 664 F.2d 1263, 1272 (5th Cir. 1982), Karleen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir. 1988), E.E.O.C. V. Borden's Inc., 724 F.2d 1390, 1396 (9th Cir. 1988). See also, 29 C.F.R. 860.120(a)(1) and (f)(1)(iii) reprinted at A-40 of Appellant's Jurisdictional Statement.

Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 54 (2nd Cir. 1986), cited by Appellant, held only that "cost considerations" need not be actuarially based. The court recognized that the purpose of the phrase "cost considerations" as used in the interpretation was to rule out the § 623(f)(2) defense where the reduction in benefits for older workers could not be justified by significant cost considerations. 785 F.2d at 54.

Appellant also relied on the concurring opinion in E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1489, 1493 (3rd Cir. 1988). However, the panel held:

> Specifically, we conclude that to disprove subterfuge, Mt. Lebanon must demonstrate why general age-related cost factors required it to reduce benefits for older workers to the extent and in the manner prescribed in the MEIT plan.

842 F.2d at 1090.

Thus, the PERS disability plan is not based on age-related cost factors and is therefore not the type of plan covered under the § 623(f)(2) exemption. The law is unanimous on this point, the decision of the Sixth Circuit should be summarily affirmed on this basis.

E. Even If § The 623(f)(2) Exemption Applies, Post-ADEA Modifications Convert A Pre-existing Plan Into A Subterfuge.

This appeal can be affirmed without reaching the question of whether McMann has been overruled by the 1978 amendment to § 623(f)(2). McMann held that a plan in existence prior to the passage of the ADEA could not be a subterfuge tc evade the purposes of the Act and the employer did not have to demonstrate that a business or economic purpose served as the basis for distinctions in benefits between older and younger workers. McMann, 434 U.S. at 203. The clear implication of McMann was that changes to a plan after passage of the ADEA were not exempted by § 623(f)(2).

There is complete agreement among the circuits that a Pre-ADEA plan that is modified after passage of the ADEA can be a subterfuge if the change is relevant. See, Cipriano v. Board of Educ. of City School Dist., 785 F.2d 51, 58 (2nd Cir. 1986), Sikora v. American Can Co., 622 F.2d 1116, 1124 (3rd Cir. 1980), E.E.O.C. v. Baltimore and Ohio R. Co., 632 F.2d 1107, 1112 (4th Cir. 1980), Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980), E.E.O.C. v. Cargill, ___ F2d ___, 47 F.E.P. 1122, 1125 n.4 (10th Cir. 1988).

Even E.E.O.C. v. Orange County, 837 F.2d 420, 423 (9th Cir. 1988), relied upon by PERS, recognized that post-ADEA modifications may convert a benefit plan into a subterfuge if the modifications are significant or relevant to the challenged practice.

The ADEA became law in 1967 and was amended in 1974 to include state and local governments. Prior to 1976, the benefits to retirees on the PERS disability plan and retirees on the regular retirement plan were based primarily on years of service and there was no minimum benefit a member could receive. In 1976, O.R.C. § 145.36 [A-1] was amended to provide a minimum payment to disabled members in the amount of 30% of a member's final average salary (FAS). No such minimum was provided for members on regular retirement. The result of this 1976 amendment was to make the disability retirement plan, which had been discriminatory on its face but not in effect, discriminatory in effect as well. Instead of receiving $355.02 (30% FAS) on disability, Betts received only $158.50 per month on regular retirement.

SUMMARY

This Court should affirm the decision of the Sixth Circuit because:

1. The PERS plan violated the 1978 amendment to the ADEA.
2. The PERS plan forced June Betts into an involuntary regular retirement.
3. The PERS disability plan is not the type of plan exempt under § 623(f)(2) of the ADEA.
4. The post-ADEA modifications to the PERS disability plan convert it into a subterfuge.

The record in this case supports these independent reasons to affirm. Therefore, consideration by this court of the narrow question presented by appellant is inappropriate at this time.

Since this case can be decided without reaching the issues raised by appellant, this appeal is too insubstantial to set it for briefing and oral argument.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT F. LAUFMAN
(Counsel of Record)
ALPHONSE A. GERHARDSTEIN
Laufman, Rauh and Gerhardstein
1409 Enquire Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Attorneys for Appellee

CASE NO. 88-389

Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL JURISDICTIONAL STATEMENT

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Assistant Attorney General
Litigation Chief,
Chief Counsel's Staff

State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

ATTORNEYS FOR APPELLANT

CASE NO. 88-389

In The Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

SUPPLEMENTAL JURISDICTIONAL STATEMENT

In footnote 6 of its jurisdictional statement, appellant Public Employees Retirement System of Ohio ("PERS") referred to *E.E.O.C. v. Cargill, Inc.*, Case No. 84-2692, which, at the time, was pending before the United States Court of Appeals for the Tenth Circuit. On August 26, 1988, the Tenth Circuit reached its decision and joined those circuit courts that have held that the decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), at least as it relates to the issue of subterfuge, was not overruled by the 1978 amendment to section 4(f)(2) of the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 623(f)(2). *See E.E.O.C. v. Cargill, Inc.*, Case No. 84-2692 (10th Cir. August 26, 1988).[1]

Thus, one more court has rejected the Sixth Circuit's conclusion that an employee benefit plan that predates the passage of the ADEA must be justified by a substantial business purpose before it can qualify for exemption from the proscriptions of the ADEA. In light of the growing list

[1] The decision in *E.E.O.C. v. Cargill, Inc.* is reproduced in the Appendix.

of appellate courts to disagree with the Sixth Circuit, plenary review, if not summary reversal, is in order.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record

30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Assistant Attorney General
Litigation Chief,
Chief Counsel's Staff

30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

ATTORNEYS FOR APPELLANT

APPENDIX

TABLE OF CONTENTS

Page

A. Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in *Equal Employment Opportunity Commission v. Cargill, Inc.*, Case No. 84-2692 (10th Cir. August 26, 1988)..... A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	No. 84-2692
Plaintiff-Appellant,	:	
v.	:	
CARGILL, INC.,	:	
Defendant-Appellee.	:	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. CIV-81-4193)

Mark S. Flynn, Equal Employment Opportunity Commission, Washington D.C., (Johnny J. Butler, Acting General Counsel, Gwendolyn Young Reams, Acting Associate General Counsel, Vella M. Fink, Assistant General Counsel, EEOC, Washington, D.C., were also on the brief) for Plaintiff-Appellant

David J. Waxse, Shook, Hardy & Bacon, Overland Park, Kansas (Carol F. Fowler, Shook, Hardy & Bacon, Kansas City, Missouri and H. Jed Hepworth, Cargill, Inc., Minneapolis, Minnesota (of counsel) were also on the brief) for Defendant-Appellee

Alfred Miller, Steve S. Honigman and Peter N. Greenwald of Miller, Singer and Raives, P.C. filed a brief *Amicus Curiae* for the American Association of Retired Persons

---

Before HOLLOWAY, Chief Judge, ANDERSON, Circuit Judge, and CHILSON, District Judge*

HOLLOWAY, Chief Judge

The Equal Employment Opportunity Commission (EEOC) brought this suit against Cargill, Inc., alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and seeking injunctive and other relief. Specifically the EEOC claimed that Cargill maintained a group life insurance program that unlawfully discriminated by denying benefits to employees age 65 and over. Both parties moved for summary judgment. The district court granted Cargill's motion and denied the EEOC's motion, holding that Cargill's policy came within the exception in § 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2). The EEOC appeals, and the sole issue is whether Cargill's insurance program violates the ADEA. We affirm.

I

The critical facts are undisputed. Cargill maintains a "Group Life Insurance Program" which provides several life and disability insurance benefits to Cargill employees. Under Cargill's program, an employee has a life insurance death benefit in a sum certain, payable to a designated beneficiary upon the employee's death. If an employee under age 60 becomes permanently and totally disabled, he or she is entitled to receive a benefit equal to the death benefit proceeds, paid out in monthly installments over a period of five or ten years. However, employees age 60 and over are treated differently; they are not eligible to receive this disability benefit. Cargill's program was instituted 13 years

---

* The Honorable Hatfield Chilson, United States District Judge for the District of Colorado, sitting by designation.

prior to the passage of the ADEA in 1967 and has been amended on several occasions since that time.[1]

In its complaint the EEOC alleged that Cargill's plan violated the ADEA because it treated employees age 60 and over differently than younger employees. Cargill answered that its plan was instituted before the ADEA was enacted and was therefore exempt from the Act. In granting summary judgment to Cargill, the district court relied on *United Airlines, Inc. v. McMann,* 434 U.S. 192 (1977), which held that forced retirement plans predating the ADEA were per se exempt from the Act. The EEOC contends that Congress has overruled *McMann* and that under current ADEA provisions, Cargill was not entitled to summary judgment because evidence was not presented to justify the discriminatory effects of the Cargill program.

II

We review the grant of summary judgment *de novo. EEOC v. County of Orange,* 837 F.2d 420, 421 (9th Cir. 1988). Viewing the record in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the movant was entitled to judgment as a matter of law so as to justify a summary judgment under Fed. R. Civ. P. 56.

The ADEA broadly prohibits arbitrary age-based discrimination in the workplace. The Act declares it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). One exception to this general prohibition is that an employer may "observe the terms of . . . any bona fide employee benefit plan such

[1] Cargill's program was instituted in 1954. A 1981 amendment eliminated the disability benefit from the program.

as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. § 623(f)(2).

On its face, Cargill's life insurance program appears to violate the ADEA's general prohibition. However, Cargill's program is exempt from the ADEA if it meets four criteria: (1) it must be the type of "plan" covered by the section; (2) it must be "bona fide" in that it exists and pays substantial benefits; (3) Cargill's action must be in observance of the plan; and (4) the plan must not be a subterfuge to evade the purposes of the Act. *County of Orange,* 837 F.2d at 421-22.[2] Only the fourth criterion is in dispute here — whether the program is a subterfuge to evade the purposes of the ADEA.

In dealing with this question, the Fifth Circuit expressed the view that because a plan was effectuated before enactment of the ADEA, any notion that the plan was adopted as a subterfuge for evasion was eliminated. *Brennan v. Taft Broadcasting Co.,* 500 F.2d 212, 215 (5th Cir. 1974). The Fourth Circuit took the position that to avail itself of the exemption of § 4(f)(2) for a pre-Act plan with an involuntary retirement provision, the employer had to demonstrate the plan was not being maintained as a subterfuge. *McMann v. United Airlines, Inc.,* 542 F.2d 217, 221 (4th Cir. 1976), *rev'd,* 434 U.S. 192 (1977). The grounds of the Supreme Court's reversal are discussed below.

The histories of both *McMann* and the subsequent statutory amendments are important. In 1977 Congress was considering an amendment to the 4(f)(2) exception to the ADEA. The legislative comments accompanying the proposed amendment indicate Congress was aware of the inter-circuit conflict, and approved of the Fourth Circuit's position that § 4(f)(2) did not permit mandatory retirement

[2] Cargill bears the burden of establishing its defense that its program falls within the 4(f)(2) exception. *See EEOC v. Westinghouse Elec. Corp.,* 725 F.2d 211, 223 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984).

pursuant to a collective bargaining agreement or pension plan. The Report also expressed disagreement with the *Brennan* opinion's view that a pre-Act plan could not be a subterfuge if operative before the effective date of the Act. S. Rep. No. 95-493, 95th Cong., 2d Sess. 10, *reprinted in* [1978] U.S. Code Cong. & Admin. News 504, 513.

While the amendment to Section 4(f)(2) was still being considered, the Supreme Court resolved the inter-circuit conflict by reversing the Fourth Circuit's *McMann* decision. *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977). The Court held: (1) § 4(f)(2) permitted involuntary retirement before age 65 under a bona fide employee benefit plan, *id.* at 198; and (2) a plan established prior to the enactment of the ADEA could not constitute a subterfuge, *id.* at 203.

In reversing the Fourth Circuit's *McMann* decision, the Court stated:

> "... [W]e find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before [the passage of the Act], or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans as the Fourth Circuit concluded. . . . [A] plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. . . . We reject any such per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act."

434 U.S. at 203.

A few months after the Court decided *McMann*, Congress passed the proposed amendment § 4(f)(2). The amendment added the language underlined below and § 4(f)(2) now provides that an employer may

> observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .

92 Stat. 189 (approved April 6, 1978), 29 U.S.C. § 623(f)(2) (1978). The Conference Committee Report accompanying the 1978 amendment indicated legislative dissatisfaction with the Supreme Court's *McMann* opinion by this statement:

> In *McMann v. United Airlines*, 98 S.Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(2)(f) by virtue of the fact they antedate the act or these amendments.

H. Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Admin. News, 528, 529.

Some courts have said that the passage of the amendment to § 4(f)(2) overruled *McMann's* holding regarding forced retirement plans. *See EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1185 (6th Cir. 1984); *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1395 n. 4 (9th Cir. 1984); *EEOC v. Maine*, 664 F.Supp. 223, 226 (D.Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987). However, the EEOC argues that the amendment overruled *McMann* in its entirety, including its view on the interpretation of the subterfuge provision in § 4(f)(2). The EEOC therefore asserts that Cargill's program is not exempt from the ADEA and that Cargill, as a party seeking to invoke the exception to the general provision, should have been required to

present economic or other evidence to show that its plan was legitimate and not a subterfuge.

We disagree with the EEOC's basic premise that the 1978 amendment overruled *McMann's* interpretation of the subterfuge provision in § 4(f)(2). We must agree with the Commission that the concluding sentence quoted above from the Conference Committee Report lends support to the Commission's position on the construction of § 4(2)(f). Moreover, legislative history is not to be ignored even though we feel "the legislative intent is clearly manifested in the language of the statute itself." *Miller v. Commissioner,* 836 F.2d 1274, 1282 (10th Cir. 1988) (quoting *Train v. Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9-10 (1976)). Nevertheless the language of the statute must be the primary source of any interpretation, *Miller,* 836 F.2d at 1283, and here the 1978 amendment of § 4(f)(2) was specific in addressing *only* involuntary retirement provisions.[3] Hence we are not persuaded that the broad language in the sentence of the Conference Committee Report supports the result urged by the Commission.

Three cases have considered and rejected the EEOC's position. *EEOC v. County of Orange,* 837 F.2d 420, 422 (9th Cir. 1988); *EEOC v. Maine,* 644 F.Supp. 223, 226-27 (D.Me. 1986), *aff'd mem.,* 823 F.2d 542 (1st Cir. 1987); *International Bhd. of Elec. Workers, Local 1439 v. Union Elec. Co.,* 585 F.Supp. 261, 264 (E.D.Mo. 1984), *aff'd,* 761 F.2d 1257 (8th Cir. 1985). We are persuaded by the Ninth Circuit's reasoning in *County of Orange:*

> Despite this broad language in the legislative history, the 1978 amendment to section 4(2)(f) only dealt with involuntary retirement provisions.

[3] In contrast, *In re Compos,* 768 F.2d 1155, 1157 (10th Cir. 1985), is a case in which subsequent statutory language and consistent legislative history show an intent to overrule a "looser standard" of statutory interpretation in a prior Supreme Court opinion. We do not find that clear pattern here where the statutory change dealt only with involuntary retirement provisions.

> Congress could have easily invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition when it reenacted 4(2)(f) without amending the subterfuge language. *Accord Lorillard v. Pons,* 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978); *Ward v. Commissioner,* 784 F.2d 1424, 1430 (9th Cir. 1986).

837 F.2d at 422; *see EEOC v. Maine,* 644 F.Supp. at 226; *International Bhd.,* 585 F.Supp. at 264; *Crosland v. Charlotte Eye, Ear and Throat Hosp.,* 686 F.2d 208, 213 (4th Cir. 1982) (dictum). We agree with these views that *McMann's* interpretation of the subterfuge provision in § 4(f)(2) remains valid and that a benefit plan instituted long before the passage of the ADEA in 1967 cannot be a subterfuge to evade the Act itself.

III

It is undisputed that Cargill instituted its life insurance program over a decade before the initial enactment of the ADEA. Under *McMann,* the plan comes within the § 4(f)(2) exception and Cargill was not required to present evidence justifying the different treatment of older employees.[4] The district court correctly granted summary judgment for Cargill and the judgment is

AFFIRMED.

[4] Although Cargill's plan has been amended since 1967, the EEOC does not claim these amendments relate to the challenged provisions. The amendments do not convert the plan into a subterfuge. *See County of Orange,* 837 F.2d at 423; *accord EEOC v. Home Ins. Co.,* 672 F.2d 252, 259 (2d Cir. 1982) (employer cannot rely on the fact that its plan predated the ADEA when discriminatory provisions were adopted after the ADEA was enacted).

CASE NO. 88-389

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Attorneys for Appellant

ROBERT F. LAUFMAN
Counsel of Record
Laufman, Rauh & Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Attorney for Appellee

Jurisdictional Statement Docketed August 31, 1988
Probable Jurisdiction Noted October 17, 1988

TABLE OF CONTENTS*

Page

Relevant Docket Entries iii

First Amended Complaint,
filed October 9, 1985 ..... JA-1

Answer to First Amended Complaint
of Public Employees Retirement System,
filed October 22, 1985 ..... JA-6

Order of District Court directing defendant
Public Employees Retirement System of Ohio
to process plaintiff's application for
disability retirement benefits,
entered June 17, 1986 ..... JA-11

* All materials included herein have been reproduced verbatim, including any typographical errors.

The following documents of the Joint Appendix are reproduced in the appendix to the Jurisdictional Statement and are designated in the brief by the reference (A-).

Page

Opinion and Judgment, June 3, 1988, of the United States Court of Appeals for the Sixth Circuit (Case Nos. 86-3676/4034), affirming district court judgment A-2

Opinion and Order, March 27, 1986, of the United States District Court for the Southern District of Ohio, Western Division (Case No. C-1-85-1108), granting plaintiff's motion for summary judgment and declaratory judgment and denying defendants' cross-motions for summary judgment A-20

Notice of Appeal, filed August 4, 1988 ..... A-35

Text of Statutes Involved

1. 29 U.S.C. §623(a) A-38
2. 29 U.S.C. §623(f)(2) A-38
3. Ohio Revised Code Section 145.35 ..... A-38

Text of Regulations Involved

1. 29 C.F.R. 860.120(a)(1) A-40
2. 29 C.F.R. 860.120(f)(1)(iii) A-40

RELEVANT DOCKET ENTRIES

1. Complaint, filed June 14, 1985 (omitted from Joint Appendix).
2. Answer of Defendant Public Employees Retirement System of Ohio, filed July 8, 1985 (omitted from Joint Appendix).
3. Plaintiff's Motion for Summary Judgment, filed September 13, 1986 (omitted from Joint Appendix).
4. First Amended Complaint, filed October 9, 1985 (JA-1).
5. Answer to First Amended Complaint of defendant Public Employees Retirement System of Ohio, filed October 22, 1985 (JA-6).
6. Cross-Motion for Summary Judgment of defendant Public Employees Retirement System of Ohio, filed December 26, 1988 (omitted from Joint Appendix).
7. Stipulations for Summary Judgment, filed January 8, 1986 (omitted from Joint Appendix).
8. Opinion and Order of District Court granting plaintiff's motion for summary judgment and declaratory judgment and denying defendants' cross-motions for summary judgment, entered March 27, 1986 (A.-20).
9. Order of District Court directing defendant Public Employees Retirement System of Ohio to process plaintiff's application for disability retirement benefits, entered June 17, 1986 (JA-11).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUNE M. BETTS	:	CIVIL ACTION NO. C-1-85-1108
Plaintiff	:	(Spiegel, J.)
vs.	:	
HAMILTON COUNTY BOARD OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES	:	**FIRST AMENDED COMPLAINT**
and	:	
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD	:	
Defendants	:	**JURY DEMAND**

I. PRELIMINARY STATEMENT

1. This is an age discrimination in employment action alleging denial of disability retirement benefits because of age. This is also a civil rights action for the violation of the constitutional rights of plaintiff. Plaintiff seeks redress pursuant to 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. Plaintiff seeks injunctive relief, declaratory judgment, back wages or lost benefits, liquidated damages, and attorney fees from defendants under the Age Discrimination in Employment Act (ADEA). Plaintiff also seeks injunctive relief, declaratory judgment, lost benefits, compensatory damages and attorney fees under §1983.

II. JURISDICTION

2. Jurisdiction over the ADEA claim is conferred on this

Court by 29 U.S.C. § 626. Jurisdiction over the § 1983 claim is conferred on this Court by 28 U.S.C. §1343(3) and (4). Jurisdiction for declaratory judgment is conferred on this court by 28 U.S.C. §§2201 and 2202.

3. Plaintiff timely filed charges with the Equal Employment Opportunity Commission (EEOC) on June 14, 1986. (Attachment 1) alleging that she had been the victim of age discrimination.

4. On June 17, 1985 the EEOC referred plaintiff's charge to the Ohio Civil Rights Commission in order to meet the referral requirements of §14(b) of the ADEA. (Attachment #2)

III. PARTIES

5. Plaintiff is 61-years-of-age and is an employee of the defendant Hamilton County Board of Mental Retardation & Developmental Disabilities and is a member of the Ohio Public Employees Retirement System.

6. Defendant Hamilton County Board of Mental Retardation and Developmental Disabilities (hereinafter the "Board") is an "employer" as defined in 29 U.S.C. §630(b).

7. Defendant Public Employees Retirement System Board (hereinafter "PERS Board") is an agency or instrumentality of the State of Ohio and is vested with the general administration and management of the Public Employees Retirement System (hereinafter "PERS"). PERS is an "employer" as defined in 29 U.S.C. §630(b).

IV. STATEMENT OF FACTS

8. Plaintiff has been an employee of the Hamilton County Board of Mental Retardation for at least six years.

9. On June 7, 1985 plaintiff was advised by her supervisor that she should apply for voluntary retirement or he would begin proceedings for involuntary retirement. He advised her that she was not eligible for disability retirement because

she was 61 years old. On July 29, 1985 PERS refused to accept or process plaintiff's application for disability retirement because plaintiff is over 60 years old.

10. Ohio Revised Code 145.35 provides that only members of PERS who have not attained the age of sixty may apply for disability retirement.

11. Plaintiff's retirement benefits under regular PERS retirement would be approximately $139.14 per month which would be approximately 11.8% of her final average salary. If plaintiff were permitted PERS disability retirement she would be entitled to no less than 30% of her final average salary.

12. Under PERS disability retirement plaintiff could return to her previous position and salary within five years if she again became able to resume work. Plaintiff does not have this right under voluntary PERS retirement.

13. Defendants' denial of plaintiffs request for disability retirement was willful, wanton, malicious and/or reckless or careless disregard or indifference to plaintiff's right not to be discriminated against because of her age.

IV. FIRST CAUSE OF ACTION (ADEA)

14. Defendants' actions violated the ADEA, 29 U.S.C. §621 *et seq.*

V. SECOND CAUSE OF ACTION (§1983)

15. Defendant's actions violated 42 U.S.C. § 1983.

RELIEF PRAYED

WHEREFORE, plaintiff prays the Court:

A. Grant equitable relief including an order requiring defendants to place plaintiff disability retirement.

B. Order defendants to pay plaintiff for lost benefits.

C. Order the defendants to pay plaintiff liquidated damages for its willful acts;

D. Award plaintiff costs incurred in the prosecution of this action and reasonable attorney's fees;

E. Award plaintiff compensatory damages;

F. Award such other appropriate relief as the Court may deem just and proper;

G. Grant plaintiff declaratory judgment that O.R.C. Chapter 145 discriminates against disabled members on the basis of age in violation of A.D.E.A. and §1983.

Robert F. Laufman
Trial Attorney for Plaintiff
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

JURY DEMAND

Plaintiff demands trial by jury on all issues triable by jury.

_____

Robert F. Laufman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was mailed to defendant PERS' trial attorney, Jeffrey J. Jurca, Assistant Attorney General, Chief Counsel's Staff, 30 E. Broad St., 16th Floor, Columbus, Ohio 43215 and to defendant Hamilton County Board of Mental Retardation and Developmental Disabilities' trial attorney, Thomas E. Deye, Assistant Prosecuting Attorney of Hamilton County, Ohio 420 Hamilton County Courthouse, Cincinnati, Ohio 45202 this ____ day of _____, 1985.

_____

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUNE M. BETTS,	:	
Plaintiff,	:	
v.	:	CASE NO. C-1-85-1108
HAMILTON COUNTY BOARD OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, et al.,	:	JUDGE SPIEGEL
Defendants.	:	

ANSWER OF DEFENDANT OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Now comes the Ohio Public Employees Retirement System Board ("PERS"), a Defendant herein, and for its answer to Plaintiff's First Amended Complaint states and avers as follows:

FIRST DEFENSE

1. Regarding paragraph 1 of the Amended Complaint, Defendant PERS admits that Plaintiff contends that this is an age discrimination in employment action alleging denial of disability retirement benefits because of age, and that she claims that her constitutional rights have been violated; that Plaintiff seeks redress under 42 U.S.C. §1983 and the Fourteenth Amendment; and that Plaintiff seeks the relief set forth in paragraph 1. Defendant PERS denies that Plaintiff is entitled to such relief, and denies the remainder of paragraph 1.

2. Regarding paragraph 2 of the Amended Complaint, Defendant PERS admits that Plaintiff is attempting to invoke the jurisdiction of this Court as set forth in said paragraph. Defendant PERS denies the remainder of paragraph 2 of the Amended Complaint.

3. Defendant PERS admits that Plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) on or about June 14, 1985, and denies the remainder of paragraph 3 of the Amended Complaint.

4. Defendant PERS admits that on June 17, 1985, the EEOC referred Plaintiff's charge to the Ohio Civil Rights Commission, and denies the remainder of paragraph 4 of the Amended Complaint.

5. Defendant PERS admits paragraphs 5 and 6 of the Amended Complaint.

6. Defendant PERS admits that it is vested with the general administration and management of the Public Employees Retirement System, and denies the remainder of paragraph 7 of the Amended Complaint.

7. Defendant PERS admits paragraphs 8, 10, and 11 of the Amended Complaint.

8. Defendant PERS is without knowledge or information sufficient to form a belief as to the truth or falsity of the first two (2) sentences of paragraph 9. Regarding the third sentence of paragraph 9, Defendant PERS states that it denied Plaintiff's application for disability retirement in accordance with the provisions of R.C. 145.35. The remainder of paragraph 9 is denied.

9. Defendant PERS denies the first sentence of paragraph 12 of the Amended Complaint, and admits the second sentence of paragraph 12.

10. Defendant PERS denies paragraphs 13, 14, and 15 of the Amended Complaint.

11. Defendant PERS denies each and every other allegation of the Amended Complaint not hereinbefore expressly admitted.

SECOND DEFENSE

12. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

13. This Court lacks subject-matter jurisdiction.

FOURTH DEFENSE

14. Plaintiff's claims are barred by the Eleventh Amendment.

FIFTH DEFENSE

15. Plaintiff has failed to exhaust state remedies in accordance with 29 U.S.C. §633(b).

WHEREFORE, having fully answered, Defendant Ohio Public Employees Retirement System Board requests that this Court dismiss the Amended Complaint, and grant it such other relief as is just and equitable under the circumstances.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

JEFFREY J. JURCA (Trial Attorney)
Assistant Attorney General
Chief Counsel's Staff
30 E. Broad St., 16th Floor
Columbus, Ohio 43215 (614) 466-2872

ANDREW I. SUTTER
Assistant Attorney General
Chief Counsel's Staff
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
(614) 466-2872

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Answer was placed in the regular U.S. Mail, postage prepaid on this _____ day of October, 1985 addressed to Robert F. Laufman, 1409 Enquirer Bldg., 617 Vine St., Cincinnati, Ohio 45202; and Thomas E. Deye, Assistant Prosecuting Attorney, 420 Hamilton County Courthouse, Cincinnati, Ohio 45202.

JEFFREY J. JURCA
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUNE M. BETTS,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO. C-1-85-1108
HAMILTON COUNTY BOARD OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES	:	JUDGE SPIEGEL
and	:	**ORDER**
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD,	:	
Defendants.	:	

WHEREAS plaintiff filed this action alleging that defendants have violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*;

WHEREAS this matter came to be heard upon plaintiff's motion for summary judgment and defendants' cross-motions for summary judgment;

WHEREAS for the reasons stated in this Court's Opinion dated March 27, 1986, the Court determined that the disability retirement plan of the Public Employees Retirement System of Ohio is not a "bona fide employee benefit plan" protected by 29 U.S.C. §623(f)(2); and further, that plaintiff was confronted with constructive discharge and forced into retirement because of her age in violation of section 623(f)(2);

WHEREAS Section 145.35 of the Ohio Revised Code provides that a member of the Public Employees Retirement System whose application for disability retirement is approved be placed on disability retirement "as of the first

day of the month immediately following the later of . . . the last day for which compensation is paid . . . or . . . the attainment of eligibility for benefits" as established by relevant medical evidence; and

WHEREAS plaintiff shall receive disability retirement benefits retroactive to the aforementioned date;

IT IS ORDERED that defendant Public Employees Retirement System process plaintiff's application for disability retirement as submitted in June, 1985, and take all other action consistent with this Court's opinion and Sections 145.35 (except for the age limitation), 145.36 and 145.39.

_____

JUDGE, U.S.D.C.

No. 88-389

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Appellant,

v.

JUNE M. BETTS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Attorneys for Appellant

Of Counsel:

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Must age-based distinctions in benefits offered through bona fide employee benefit plans, including plans promulgated prior to the passage of the Age Discrimination in Employment Act, be justified by a substantial business purpose or age-related cost considerations?

PARTIES

The parties to the proceedings below were the Public Employees Retirement System of Ohio, the Hamilton County Board of Mental Retardation and Developmental Disabilities, and June M. Betts.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Age Discrimination in Employment Act ... 3

B. The Public Employees Retirement System of Ohio 4

C. June M. Betts 6

D. The Proceedings Below 7

SUMMARY OF ARGUMENT 12

ARGUMENT 16

I. THE COURT'S HOLDING IN *UNITED AIR LINES, INC. V. MCMANN*, CONCERNING THE DEFINITION OF SUBTERFUGE, A BUSINESS PURPOSE RULE, AND THE MANNER IN WHICH A BONA FIDE EMPLOYEE BENEFIT PLAN THAT PREDATES THE PASSAGE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT MAY SATISFY THE SUBTERFUGE LANGUAGE OF SECTION 4(F)(2) OF THE ACT, REMAINS CONTROLLING LAW 16

TABLE OF CONTENTS–Continued

Page

II. SECTION 4(F)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOES NOT REQUIRE AN EMPLOYER TO DEMONSTRATE THE EXISTENCE OF AGE-RELATED COST CONSIDERATIONS IN ORDER TO JUSTIFY AGE-BASED DISTINCTIONS IN BENEFITS OFFERED THROUGH A BONA FIDE EMPLOYEE BENEFIT PLAN..... 23

A. The Language Of Section 4(f)(2) Does Not Make Any Mention of Age-Related Cost Considerations..... 24

B. The Legislative History Associated With Section 4(f)(2), As Originally Enacted, Does Not Support The Conclusion That Age-Related Cost Considerations Are A Component Of The Section 4(f)(2) Exemption 30

C. The Legislative History Associated With The 1978 Amendment To Section 4(f)(2) May Not Be Relied On To Interject An Age-Related Cost Considerations Requirement Into Section 4(f)(2).... 39

CONCLUSION 49

APPENDIX a-1

TABLE OF AUTHORITIES

Page

CASES:

Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) 15, 46

American Bank and Trust Co. v. Dallas County, 463 U.S. 855 (1983) 28

Barber v. Gulf Publishing Co., 103 Lab. Cas. (CCH) 11,676 (S.D. Miss. 1986)..... 28

Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 28, 40, 45

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 26

Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980) 25

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980)..... 15, 21, 22, 25, 45

Cronin v. Police Dep't, 675 F. Supp. 847 (S.D.N.Y. 1987)..... 28

Donovan v. Anheuser-Busch, Inc., 666 F.2d 315 (8th Cir. 1981) 28

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 15, 22

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 46

EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988) 13, 21

EEOC v. City of Mt. Lebanon, Pennsylvania, 842 F.2d 1480 (3d Cir. 1988) 10, 24, 47

EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)..... 13, 15, 21, 22

EEOC v. Maine, 664 F. Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987) 22, 24

TABLE OF AUTHORITIES–Continued

Page

EEOC v. Westinghouse Electric Co., 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984) 24, 46

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., ___ U.S. ___, 108 S. Ct. 376 (1987) 28

International Brd. of Elec. Workers, Local 1439 v. Union Electric Co., 585 F. Supp. 261 (E.D. Mo. 1984) *aff'd*, 761 F.2d 1257 (8th Cir. 1985) 22

Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) 10, 24

Lewis v. United States, 445 U.S. 55 (1980) 16, 28

Lorillard v. Pons, 434 U.S. 575 (1978) 21, 27

Mackey v. Lanier Collections Agency & Service, Inc., ___ U.S. ___, 108 S. Ct. 2182 (1988) 46

McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976) 18, 40

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 46

Perrin v. United States, 444 U.S. 37 (1979) 16

Pierce v. Underwood, ___ U.S. ___, 108 S. Ct. 2541 (1988) 25

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 27

Teamsters v. United States, 431 U.S. 324 (1977) 46

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) ..... *passim*

Zinger v. Blanchette, 549 F.2d 217 (4th Cir. 1976) 40

TABLE OF AUTHORITIES–Continued

Page

STATUTES

29 U.S.C. § 207(e)(4) 27

29 U.S.C. § 302 (repealed 1974) 27

29 U.S.C. § 621(b) 3, 29, 47

29 U.S.C. § 623 ..... 2, 3

29 U.S.C. § 623(f)(2) ..... *passim*

29 U.S.C. § 1002(2)(A)(i) 29

41 U.S.C. § 351(a)(1) and (2) 27

42 U.S.C. § 2000e-14 (1964) (repealed 1972) 30

Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) 31

Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(b), 92 Stat. 189 (1978) 20

Act of June 27, 1988, Pub. L. No. 100-352, § 7, 102 Stat. 662 (1988) 2

Ohio Rev. Code § 145.23 5

Ohio Rev. Code § 145.23(C) 5

Ohio Rev. Code § 145.33 ..... 4, 38

Ohio Rev. Code § 145.34 4

Ohio Rev. Code § 145.35 ..... 2, 4, 5, 7

Ohio Rev. Code § 145.36 5

Ohio Rev. Code § 145.381 5

Ohio Rev. Code § 145.39 5

Ohio Rev. Code § 145.47 5

Ohio Rev. Code § 145.48 5

Ohio Rev. Code § 3307.42 4

Ohio Rev. Code § 3309.39 4

TABLE OF AUTHORITIES–Continued

Page

REGULATIONS

29 C.F.R. § 860.120(a)(1), *presently codified at* 29 C.F.R. § 1625.10(a)(1) 2, 8, 10

29 C.F.R. § 860.120(f)(1)(iii), *presently codified at* 29 C.F.R. § 1625.10(f)(1)(iii) 2, 10

29 C.F.R. § 1625.10(b) 26

LEGISLATIVE MATERIALS

S. Rep. No. 1487, 89th Cong., 2d Sess. (1966) 31

S. Rep. No. 723, 90th Cong., 1st Sess. (1967) 36

H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) 35

S. Rep. No. 493, 95th Cong., 1st Sess. (1977) 41, 45

H.R. Rep. No. 527, 95th Cong., 1st Sess. (1977) 40

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978) 18, 42

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) 32, 33

"The Older American Worker: Age Discrimination in Employment," Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965) 30

Senate Amendment No. 714 to H.R. 1371, 89th Cong., 2d Sess. (1966) 31

S. 1024, 90th Cong., 1st Sess. (1967) 35

S. 1103, 90th Cong., 1st Sess. (1967) 35

H.R. 5741, 90th Cong., 1st Sess. (1967) 35

H.R. 13054, 90th Cong., 1st Sess. (1967) 35, 36

H.R. 5383, 95th Cong., 1st Sess. (1977) 18, 19, 40

TABLE OF AUTHORITIES–Continued

Page

113 Cong. Rec. (1967):

p. 1377 31

p. 2794 32

p. 7076 ..... 33, 34

p. 31,255 36

p. 34,740 36

p. 34,745 37

p. 34,750 37

123 Cong. Rec. (1977):

p. 34,295 42

p. 34,323 42

124 Cong. Rec. (1978):

p. 7880 43

p. 7881 ..... 21, 43

p. 7884 19

p. 7886 21

p. 7887 ..... 21, 43

p. 7888 ..... 19, 43

p. 8217 44

p. 8218 44

MISCELLANEOUS

Black's Law Dictionary (Fifth Ed. 1979) 28

H. Friendly, *Benchmarks* (1967) 16

Fundamentals of Employee Benefit Programs (Employee Benefit Research Institute, 3d ed. 1987) 25

The Total Approach to Employee Benefits (A. Deric ed. 1967) 26

Webster's II Riverside University Dictionary (1984) 25, 26

No. 88-389

In The

Supreme Court of the United States

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Appellant,

v.

JUNE M. BETTS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued June 3, 1988, is set forth in the appendix to the Jurisdictional Statement (A-1)[1] and is reported at 848 F.2d 692. The decision of the United States District Court for the Southern District of Ohio, Western

[1] References to "(A-)" are to the appropriate pages in the appendix to the Jurisdictional Statement. References to "(JA-)" are to the appropriate pages in the Joint Appendix. References to "(a-)" are to the appropriate pages in the appendix to the Brief for Appellant.

Division, is also set forth in the appendix to the Jurisdictional Statement (A-20) and is reported at 631 F. Supp. 1198.

JURISDICTION OF THE COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on June 3, 1988, holding Ohio Revised Code § 145.35 in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. This action was initiated by Appellee in the district court by filing a complaint pursuant to 42 U.S.C. § 1983 and 29 U.S.C. § 626(c). The Notice of Appeal was filed with the Sixth Circuit on August 4, 1988, and the appeal docketed with this Court on August 31, 1988, both events occurring within 90 days of entry of the court of appeals' judgment. Probable jurisdiction was noted on October 17, 1988. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(2).[2]

STATUTES AND REGULATIONS INVOLVED

This case involves 29 U.S.C. § 623(a) and (f)(2) (a-5), Ohio Revised Code § 145.35 (a-21), and 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii) (a-32), which have been reproduced in the appendix to the Jurisdictional Statement. (A-38-41.)

---

[2] This appeal, predicated on a decision issued June 3, 1988, is unaffected by a recent amendment to 28 U.S.C. § 1254, eliminating the right to appeal certain decisions of the courts of appeals. *See* Act of June 27, 1988, Pub. L. No. 100-352, § 7, 102 Stat. 662, 664 (1988).

STATEMENT OF THE CASE

A. The Age Discrimination In Employment Act.

The Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634, prohibits discrimination against workers age forty and older[3] "with respect to . . . compensation, terms, conditions, or privileges of employment . . . because of age. . . ." 29 U.S.C. § 623(a)(1). (a-5.) One of the exceptions to this general proscription is contained in 29 U.S.C. § 623(f)(2) ("section 4(f)(2)") (a-5), which provides that

> [i]t shall not be unlawful for an employer, employment agency, or labor organization –
>
> * * *
>
> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter,[4] except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary

---

[3] At the time of its passage, the ADEA protected workers between the ages of forty and sixty-five. In 1978, the upper age limit was raised to seventy. In 1986, the upper limit was eliminated entirely.

[4] The purposes of the ADEA are

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b).

retirement of any individual. . . . because of the age of such individual. . . .[5] (Footnotes added.)

B. The Public Employees Retirement System of Ohio.

In 1933, the Ohio General Assembly created the Public Employees Retirement System of Ohio ("PERS").[6] Under the PERS statutory scheme, *see* Ohio Rev. Code ("O.R.C.") §§ 145.01-.59, monthly retirement benefits are available to members who terminate their public employment and qualify either on the basis of age and service, *see* O.R.C. § 145.33 (a-13), or because of permanent disability, *see* O.R.C. § 145.35 (a-21). A member of PERS is eligible for age and service retirement benefits if (1) he has accumulated a minimum of five years of service credit and is at least sixty years of age, O.R.C. § 145.33 (a-13), or (2) has thirty years of service credit, *id.*, or (3) has twenty-five years of service credit and is at least fifty-five years of age, O.R.C. § 145.34. (a-19.) Any member who has a minimum of five years of service credit, has not attained the age of sixty, is not receiving retirement benefits under any other Ohio or municipal retirement program, and is incapacitated by a disabling medical condition which is, or is presumed to be, permanent, may qualify for disability retirement benefits. O.R.C. § 145.35.

---

[5] The language prohibiting involuntary retirement provisions was added in 1978.

[6] PERS is one of five public employee retirement systems in existence in Ohio. The State Teachers Retirement System, School Employees Retirement System, Police and Firemen's Disability and Pension Fund, and Highway Patrol Retirement System are the other four. The State Teachers and School Employees systems have disability retirement provisions identical to the PERS provision. *See* O.R.C. §§ 3307.42 and 3309.39.

(a-21.) The calculation for arriving at the annual benefit for an age and service retirant and disability retirant is similar, except that since 1976, a disability retirant receives no less than thirty percent of his final average salary. O.R.C. § 145.36. (a-23.)

A disability retirant is treated as if on leave of absence for the first five years of retirement. If his condition improves sufficiently during that period of time, he is entitled to be restored to his former or similar position and salary. O.R.C. § 145.39. (a-27.) An age and service retirant, while not on leave of absence, may, after eighteen months, apply for full-time employment with any public employer covered by PERS, including his former agency. O.R.C. § 145.381(C). (a-25.) If he is reemployed, his pension benefits are suspended until he again chooses to retire. *Id.*

Funding for PERS is provided by contributions from employees, *see* O.R.C. § 145.47, and employers, *see* O.R.C. § 145.48. These contributions are not segregated into separate funds for age and service or disability retirement benefits. Rather, they serve as resources for the payment of all benefits offered by PERS. *See* § 145.23. (a-9.) All disbursements of benefits, age and service as well as disability, are from one fund. *See* O.R.C. § 145.23(C). (a-10.) In addition, actuarial assumptions underlying the fiscal soundness of PERS are predicated on the amount of liability created by the payment of both age and service and disability retirement benefits.

At the time this litigation was initiated, PERS ranked fifteenth among all public and private pension systems in the United States, with assets in excess of one billion dollars. *See Pensions and Investment Age*, Special Profiles Issue: 22 (Jan. 20, 1986). During calendar year 1984, PERS

disbursed a total of $336,443,286.01 in age and service retirement benefits and $39,772,278.07 in disability retirement benefits.

C. June M. Betts.

June Betts ("Betts") was born on September 30, 1923. She was hired by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB") in 1978. From approximately 1979 until 1984, she was employed by HCB as a speech pathologist. In 1984, because of acknowledged unsatisfactory job performance, Betts voluntarily accepted reassignment as a workshop specialist, a lesser position.

In September of that year, because of failing health, Betts became incapable of satisfactorily performing the duties of a workshop specialist. Once again, she voluntarily accepted reassignment to a less responsible position. She also accepted a reduction in salary.

By May 1985, Betts' job performance had deteriorated to such an extent that it was recognized by employer and employee alike that she had become incapable of serving her clients or the agency. At all times, she was both informed by HCB and personally aware of her diminishing capacities.

Later in May, HCB notified Betts that it had no choice but to initiate proceedings to place her on unpaid medical leave. Betts was also made aware that she met minimum eligibility standards for age and service retirement benefits with PERS. Such benefits would provide her with a monthly pension and health coverage. At all times, Betts was free to contest any efforts by HCB to have her placed on unpaid medical leave and to refuse to retire.

On June 3, 1985, Betts voluntarily submitted to HCB a letter announcing her retirement. At no time was Betts' age mentioned as a factor contributing to HCB's employment decisions.

In July 1985, Betts submitted to PERS applications for both age and service retirement benefits and disability retirement benefits, requesting that the former be processed only if PERS rejected Betts' application for disability retirement benefits. Subsequently, Betts was notified by PERS that her application for disability retirement benefits could not be considered in light of the age limitation in O.R.C. § 145.35. Her application for age and service retirement benefits was then processed and approved.

D. The Proceedings Below.

On June 14, 1985, Betts filed a complaint with the United States District Court for the Southern District of Ohio, Western Division, and a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that PERS' refusal to process her application for disability retirement benefits violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Betts filed an amended complaint on October 9, 1985.[7] (JA-1.)

The sole issue presented to the district court was whether PERS qualified for exemption from the prohibitions of the ADEA pursuant to section 4(f)(2). The district court acknowledged that PERS disability retirement benefits were "bona fide" to the extent that they "exist[] and

---

[7] Betts later dropped a § 1983 claim.

pay[] substantial benefits," *Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities*, 631 F. Supp. 1198, 1204 (S.D. Ohio 1986) (A-29-30), and that they are designed to provide benefits "to those younger individuals who become permanently disabled and who would otherwise have no source of income during their disability," *id.* at 1202. (A-25.)

The district court, however, chose not to address PERS' contention that it was not a "subterfuge to evade the purposes of the [ADEA]" by virtue of the Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), which held, among other things, that a bona fide employee benefit plan that predated the passage of the ADEA could not be a subterfuge to evade the purposes of the Act and that employers did not have to show a business purpose in order to justify age-based distinctions in employee benefit plans. *See McMann*, 434 U.S. at 203.[8] Instead, the district court scrutinized the salient characteristics of PERS disability retirement benefits and determined that the age sixty limitation on applying for those benefits was not dictated by "significant [age-related] cost considerations." *Betts*, 631 F. Supp. at 1204. (A-29.) As a result, PERS disability retirement benefits did not qualify as "the type of plan contemplated by the exemption." *Id.* The court drew support for this proposition from EEOC guidelines claiming that the "legislative history of . . . [section 4(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." *Betts*, 631 F. Supp. at 1204. (A-28-29.) (*quoting* 29 C.F.R. § 860.120(a)(1), *presently codified at* 29 C.F.R. § 1625.10(a)(1)). (A-40.) (a-32.)

---

[8] The other crucial ruling in *McMann* was that section 4(f)(2) did not prohibit involuntary retirement provisions.

The district court then provided two other reasons why PERS did not qualify for coverage under section 4(f)(2). First, the court reasoned that Betts' ineligibility for disability retirement benefits reduced her choices for responding to the problems generated by her poor health from three – unpaid medical leave, disability retirement benefits, and age and service retirement benefits – to only two. The court believed that Betts' only legitimate option, however, was to apply for age and service retirement benefits. *Id.* at 1204-05. (A-30.) According to the court, therefore, Betts' ineligibility for disability retirement benefits resulted in her being involuntarily retired and constructively discharged.

Second, the district court held that, by its terms, PERS' plan did not authorize involuntary retirement. Consequently, PERS could not qualify for the protections of section 4(f)(2) because it had not observed the terms of its plan. *Id.* at 1205. (A-31-32.)

On appeal, the Sixth Circuit affirmed. *See Betts*, 848 F.2d 692 (6th Cir. 1988). (A-1.) Relying exclusively on the legislative history of the 1978 amendment to section 4(f)(2), the appellate court concluded that

> Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H. R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 529.

Betts, 848 F.2d at 694. (A-4.)

The Sixth Circuit also agreed with the district court that the "critical factor" in determining whether PERS

was exempt under section 4(f)(2) was whether the age sixty cut-off for applying for disability retirement benefits was "based upon age-related cost factors as set forth" in 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii). The court stated:

> Where . . . the employer uses age – not cost, or years of service, or salary – as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [section 4(f)(2)]. *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988). *Accord, Equal Employment Opportunity Commission v. City of Mt. Lebanon . . .*, No. 87-3189 (3d Cir. March 30, 1988). . . .

Betts, 848 F.2d at 694-95.[9] (A-5-6.) Because PERS did not present evidence that the age sixty limitation was based

---

[9] Sandwiched between the Sixth Circuit's pronouncement concerning the current status of the holding in *McMann* and its quote from *Karlen* is the following cryptic comment: "*We agree [with the district court]*. Under the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." *Betts*, 848 F.2d at 694. (A-5.) (Emphasis added.) Although the court referred to the concept of "forced retirement," it is apparent, when the court's decision is read in its entirety, that the holding of the case was not that Betts had been "involuntarily retired" within the meaning of section 4(f)(2).

The Sixth Circuit was agreeing with the conclusion of the district court that " 'the critical factor in [the] determination of whether defendants' plan is the *type of plan* exempted is whether *it is based upon age-related cost factors as set forth in the regulatory interpretation of . . . [section 4(f)(2)].*' 631 F. Supp. 1198, 1204 (S.D. Ohio 1986). *See* 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii)." *Betts*, 848 F.2d at 694. (A-4.) (Emphasis

(Continued on following page)

on age-related cost considerations, the Sixth Circuit felt obligated to uphold the district court's grant of summary judgment for Betts. *Id.* at 695. (A-6-7.)

The Sixth Circuit's decision was not unanimous. *See Betts*, 848 F.2d at 695. (Wellford, J., dissenting.) (A-7.) Judge Wellford agreed with the district court's conclusion that PERS was bona fide, *id.* at 699 (JA-18), and noted the district court's finding that the plan did not reflect any "ill will" toward Betts or other similarly situated individuals, *id.* at 697 (JA-10). He did not, however, share the district court's other conclusions.

Judge Wellford found that PERS' plan "sought to encourage long term employment . . . and . . . was not designed to discriminate against the hiring of the older worker, as evidenced by [HCB's] hiring of Betts at age 55." *Id.* at 700. (JA-17.) He emphasized that there was no dispute between the parties that steps taken to separate Betts from employment were motivated exclusively by her poor health and its effect on her job performance. *Id.* at 699. (JA-15.) These factors, coupled with the facts that PERS' plan "did not require or make reference to age-based involuntary retirement," *id.* at 700 (A-18), that Ohio

---

(Continued from previous page)

added.) (Footnote omitted.) Neither the district court's opinion nor the above-quoted regulations, which serve as the bases for the Sixth Circuit's conclusion, even remotely suggest that a substantial business purpose or age-related cost considerations can justify involuntary retirement. Thus, it is improbable that the Sixth Circuit was addressing the issue of involuntary retirement when it made the existence of a substantial business purpose and age-related cost considerations the twin foundations for its affirmance of the district court's decision.

law permitted an age and service retirant to suspend his retirement and secure employment with any public employer, including his former employer, *id.* at 701 (A-18), that PERS had acted in observance of its plan, and that PERS' plan "was adopted long before ADEA became law," *id.* at 700 (A-16), convinced the dissent that PERS should be exempt from the ADEA.

Judge Wellford devoted a major portion of his dissent to the "age-related cost considerations" theory relied on by the Sixth Circuit majority and the district court to invalidate PERS' plan. He observed that the language of section 4(f)(2) made no mention of age-related cost considerations and that the EEOC's regulations were not "in accord with statutory purpose and add[ ] a dimension, economic cost justification, *not* in the statute." *Betts*, 848 at 701. (A-18-19.) (Emphasis in original.) The dissent criticized the majority's reliance on the legislative history of the 1978 amendment of section 4(f)(2) to undermine the clear language of the exemption, especially in light of the fact that the legislative history in question demonstrated that the purpose of the 1978 amendment was not to overrule *McMann* in respect to the definition of subterfuge and the treatment of pre-existing plans, but only in respect to the issue of involuntary retirement.

SUMMARY OF ARGUMENT

Section 4(f)(2) of the Age Discrimination in Employment Act does not require a bona fide employee benefit plan to demonstrate that a business or economic purpose underlies distinctions in benefits offered to older and younger workers. In *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the Court reviewed the plain terms of section 4(f)(2) and held that (1) employers with bona fide

employee benefit plans did not have "to show an economic or business purpose in order to satisfy the subterfuge language of . . . [section 4(f)(2)]"; (2) because a subterfuge is a "scheme, stratagem, or artifice of evasion," a bona fide plan created years before the passage of the ADEA could not be a subterfuge to evade the Act's purposes; and (3) involuntary retirement provisions did not violate the ADEA. *McMann*, 434 U.S. at 203.

In 1978, Congress amended section 4(f)(2) to make involuntary retirement provisions unlawful. The unambiguous language of the amendment, however, gives no indication that Congress intended to overrule any other portion of the *McMann* decision. Thus, the Sixth Circuit's opinion that *McMann* also was overruled in respect to how a pre-existing plan can satisfy the subterfuge prong of section 4(f)(2) is based exclusively on a tenuous reading of legislative history associated with the 1978 involuntary retirement amendment.

Assuming, arguendo, that the 1978 legislative history evidences some congressional displeasure with *McMann* for its holding in respect to the meaning of subterfuge, that displeasure alone, in the absence of legislation, cannot serve as the basis for overruling *McMann* concerning the subterfuge issue. The 1978 amendment undeniably dealt only with involuntary retirement. *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988). *Accord, EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988). When Congress amended section 4(f)(2) in 1978 to prohibit involuntary retirement provisions, it also could have added language that redefined subterfuge or incorporated a business purpose requirement within section 4(f)(2). *Id.* The fact that Congress did not is more reflective of the legislature's intention in 1978 and the purpose

of the 1978 amendment than is legislative history which, at best, is ambiguous.

Even if the legislative history relied on by the Sixth Circuit was given its most expansive interpretation *and* given the force of law, it would overrule *McMann* only to the extent that a plan could no longer satisfy the subterfuge language of section 4(f)(2) by virtue of predating the passage of the Act. The legislative history still would not justify reading a business purpose into the exemption.

The weaknesses inherent in the Sixth Circuit's holding concerning the current vitality of *McMann* and the "business purpose" rule also undermine the appellate court's conclusion that only plans that base differences in benefits for older workers on age-related cost considerations qualify for the coverage of section 4(f)(2). The plain language of section 4(f)(2), both before and after amendment in 1978, makes no reference to age-related cost considerations. By utilizing the phrase "any bona fide employee benefit plan," Congress intended to protect a wide range of benefits in order to enlist the full cooperation of employers in advancing the purposes of the ADEA: the hiring, retaining, and promotion of workers regardless of age. Although the legislative history of the 1978 amendment contains the comments of some legislators professing support for the "age-related cost considerations" theory, that same history emphasizes that in 1978, Congress was concerned with the problem of involuntary retirement and that the 1978 amendment, as drafted, did not extend beyond addressing that problem. Moreover, sporadic references in 1978 to age-related cost considerations are not part of the legislative history of

section 4(f)(2) as promulgated in 1967 and cannot, therefore, be relied on to explain the meaning of a statute enacted a decade earlier. *McMann*, 434 U.S. at 200 n. 7.

No matter how one interprets the 1978 legislative history, the facts remain that in 1967 Congress did not limit the exemption to plans reflecting age-related cost considerations and in 1978 Congress did not pass legislation to make the age-related cost considerations theory controlling law. *See County of Orange*, 837 F.2d at 422; *see also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-79 (1977). The impressions of a few legislators in 1978 concerning the intentions of a Congress convened ten years earlier should not be deemed sufficient authority to supercede clear and unambiguous statutory language. *See Consumer Product Safety Commission v. GTE Sylyania*, 447 U.S. 102, 117-18 (1980).

Finally, even if an age-related cost considerations theory is adopted as law, the coverage of section 4(f)(2) still should be extended to PERS disability retirement benefits because they are an integral part of an otherwise bona fide retirement and pension system. *See Alford v. City of Lubbock*, 664 F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982). Because PERS disability retirement benefits are designed to provide a continuous, life-long source of income, they are clearly distinguishable from the type of "one-shot" or ad hoc payments invalidated by other courts. As important, because PERS disability retirement benefits do not serve to discourage the hiring, retaining, or promotion of older workers, they do not run afoul of the purposes of the ADEA.

ARGUMENT

I. THE COURT'S HOLDING IN *UNITED AIRLINES, INC. V. MCMANN*, CONCERNING THE DEFINITION OF SUBTERFUGE, A BUSINESS PURPOSE RULE, AND THE MANNER IN WHICH A BONA FIDE EMPLOYEE BENEFIT PLAN THAT PREDATES THE PASSAGE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT MAY SATISFY THE SUBTERFUGE LANGUAGE OF SECTION 4(F)(2) OF THE ACT, REMAINS CONTROLLING LAW.

Justice Frankfurter once remarked that the three rules of statutory construction are: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Quoted in* H. Friendly, *Benchmarks* 202 (1967). *See also Lewis v. United States*, 445 U.S. 55, 60 (1980) (statutory interpretation begins with "language of the statute itself"). This directive compliments the "fundamental canon of statutory construction . . . that . . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Consistent with these tenets, the Court, in *McMann v. United Airlines, Inc.*, 434 U.S. 192 (1977), reviewed the language of section 4(f)(2) and reached the following conclusions relevant to the case at bar: (1) "[i]n ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *Id.* at 203. Because this definition necessarily implies "intent," a bona fide employee benefit plan established several years prior to the passage of the ADEA "cannot be a subterfuge to evade [the] Act . . . ," and (2) section 4(f)(2) does not require "an employer to show an

economic or business purpose in order to satisfy the subterfuge language of the Act." *Id.*

In addition to defining "subterfuge" and rejecting the "business purpose" theory, the *McMann* Court also resolved a conflict between the circuits involving involuntary retirement by ruling that section 4(f)(2) protected mandatory retirement provisions. At the time, section 4(f)(2) provided that it was lawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

One year later, in 1978, Congress responded to *McMann* by amending section 4(f)(2) by adding the following phrase:

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual. . . .

Obviously, there is nothing in the plain language of the exemption as originally drafted or the amendment thereof to indicate that Congress intended to incorporate within section 4(f)(2) the requirement that age-based distinctions in benefit plans had to be justified by a substantial business purpose or that a pre-existing plan could be a subterfuge to evade the ADEA. Consequently, the Sixth Circuit was reduced to relying on legislative history to support its opinion that "Congress expressly repudiated" the holding of *McMann* in respect to pre-existing plans and the business purpose theory.

The specific piece of legislative history relied on by the Sixth Circuit is the following comment by the Conference Committee on the 1978 amendment:

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.
>
> In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H. R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 529. *Also reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967* ("*EEOC Legislative History*"), at 519 (1981). Only the last sentence, when read without reference to the material that precedes it, lends any credence to the Sixth Circuit's holding. Yet even that last sentence does not indicate that Congress was criticizing the *McMann* court's pronouncements in regard to the definition of subterfuge, the manner in which a pre-existing plan may satisfy the subterfuge prong of section 4(f)(2), or the business purpose theory. Rather, when read in context, the last sentence indicates only that Congress intended to make involuntary retirement provisions unlawful, whether or not they were created before or after the passage of the ADEA in 1967.

According to the summary of the Conference Report on the Age Discrimination in Employment Act Amendments of 1978, H.R. 5383,

> the bill amends and strengthens the Age Discrimination in Employment Act of 1967 (ADEA) by increasing the maximum age for protection under the Act from 65 to 70 for most private employees, and by removing completely the mandatory retirement age of 70 for most federal employees. *The bill also clarifies Section 4(f)(2) (bona fide retirement plans) under the ADEA so that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.*

124 Cong. Rec. 7884 (March 21, 1978). (Emphasis added). This interpretation of the 1978 amendment is reinforced by the remarks of Congressman Waxman, a sponsor of the 1978 amendment:

> A study of the legislative history surrounding the 4(f)(2) exception reflects the intention that it further and encourage the employment of older workers. Congress feared that requiring participation of older workers in benefit plans would discourage employment of newly hired older workers.
>
> The conference report clarifies any doubt surrounding the intent of the exception and specifically disagrees with the finding of the Supreme Court in *McMann v. United States* [sic] (98 S. Ct. 244 1977). The amendment prohibits mandatory retirement for persons under age 70 enrolled in a bona fide retirement or pension plan. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act. One exception to this prohibition would be persons between 65 and 70 subject to a collective bargaining agreement in effect prior to September 1, 1977.

124 Cong. Rec. 7888 (March 21, 1978).

H.R. 5383 evolved into Public Law 95-256. Section 2(a) of the public law contained the proscription against involuntary retirement that modified section 4(f)(2) of the Act. Section 2(b) of Public Law 95-256 provided that

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(b), 92 Stat. 189 (1978). (a-9.) The language of Public Law 95-256 clarifies the scope of the comments made by Representative Waxman and the conferees: Congress intended to prohibit involuntary retirement provisions; pursuant to section 2(b) of Public Law 95-256, all involuntary retirement provisions, even those that existed prior to 1967, were excluded from the protection of the exemption; except that employers with mandatory retirement provisions included in collective bargaining agreements entered into prior to September 1, 1977, were given until as late as 1980 to bring those collective bargaining agreements into compliance with the new law. Thus, rather than rejecting *McMann* in its entirety, the criticism of the holding in that case lodged by the conferees and Representative Waxman was intended to emphasize that under the amendment to section 4(f)(2), involuntary retirement provisions no longer would be valid, even if they predated the passage of the ADEA in 1967.[10] *See* Remarks of Representative

---

[10] A few members of the House, including Representatives Hawkins and Pepper, offered their opinions that an economic or business purpose should be required before a bona fide

(Continued on following page)

Weiss, co-author of the 1978 amendment to section 4(f)(2), 124 Cong. Rec. 7887 (March 21, 1978) ("provision in pension or seniority plan which would mandate early retirement would be unlawful regardless of whether the plan came into effect before or after the enactment of the ADEA or these amendments").

In any event, the preceding legislative history, as well as other comments by members of Congress during the debates over the 1978 amendment to section 4(f)(2) is, at best, ambiguous and does not amount to "express repudiation" of *McMann*. As noted by the United States Court of Appeals for the Ninth Circuit,

> the 1978 amendment to section 4(f)(2) only dealt with involuntary retirement provisions. Congress could have *easily* invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted 4(f)(2) without amending the subterfuge language. *Accord Lorillard v. Pons*, 434 U.S. 575, 581. . . .

EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988). (Emphasis added.) *Accord, EEOC v. Cargill*, 855 F.2d

---

(Continued from previous page)

employee benefit plan qualified for the exemption under section 4(f)(2). *See, e.g.*, 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in EEOC Legislative History*, at 528; 124 Cong. Rec. 7886 (March 21, 1978), *reprinted in EEOC Legislative History*, at 533. These comments, however, constitute the personal views of these congressmen concerning the scope of section 4(f)(2) as originally enacted in 1967. They do not address the purpose of the 1978 amendment, which clearly only spoke to the problem of involuntary retirement. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) ("views of subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). (Citations and footnote omitted.)

682, 686 (10th Cir. 1988) (quoting the preceding passage in *County of Orange*); *EEOC v. Maine*, 644 F. Supp. 223, 226 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987) ("If Congress had wished to state a plan's chronology alone would not satisfy the subterfuge prong of Section 4(f)(2), it could have plainly said so."); *International Brd. of Elec. Workers, Local 1439 v. Union Elec. Co.*, 585 F. Supp. 261, 264 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985).

The preceding cases all stand for the proposition that subsequent legislation, not legislative history, is necessary to supercede one of this Court's standing interpretations of law. *Cf. Consumer Product Safety Commission*, 447 U.S. at 118 n. 13 ("[s]ubsequent legislation declaring . . . intent of earlier statute . . . entitled to great weight" . . . but "[s]tatement in conference report of such legislation as to what . . . committee believes an earlier statute meant is obviously less weighty"). Congress could only defuse the impact of *McMann* by transforming any displeasure with that decision into legislation plainly contrary to the Court's position. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-79 (1977) (by re-enacting legislation in substantially same form, Congress ratifies court's statutory interpretation, even if that interpretation is the subject of criticism). Although Congress did specifically overrule *McMann* in respect to involuntary retirement provisions, it did not do so with respect to the other holdings in *McMann*.

Even if it is assumed that the thrust of the 1978 amendment to section 4(f)(2) is broader than reflected by the amendment's plain language and that the legislative history previously referred to provides that additional

breadth, the most expansive reading possible of the portion of the conferees' remarks that serves as the underpinning of the Sixth Circuit's opinion – we "disagree with the Supreme Court's holding . . . [in *McMann*]. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments" – would serve only to limit the manner in which a pre-existing plan can demonstrate that it is not a subterfuge. The conferees' remarks still could not be interpreted to mean that the *McMann* Court's definition of subterfuge and its position on the business purpose theory are invalid.[11]

II. SECTION 4(F)(2) OF THE ADEA DOES NOT REQUIRE AN EMPLOYER TO DEMONSTRATE THE EXISTENCE OF AGE-RELATED COST CONSIDERATIONS IN ORDER TO JUSTIFY AGE-BASED DISTINCTIONS IN BENEFITS OFFERED THROUGH A BONA FIDE EMPLOYEE BENEFIT PLAN.

Of course, the Sixth Circuit went much further than simply stating that a business purpose must exist before

---

[11] If the conferees were expressing the opinion that employee benefit plans could not satisfy the subterfuge requirement of section 4(f)(2) simply by the fact that they predated the Act, then it would appear that they agreed with the concurrence of Justice White and the dissent of Justices Marshall and Brennan in *McMann*. But Justice White also rejected the business purpose theory, opining that the Act exempted "all retirement plans . . . as long as the benefits they pay are not so unreasonably small as to make the 'retirements' nothing short of discharge." *McMann*, 434 U.S. at 207. Justices Marshall and Brennan expressed no opinion on how an employee benefit plan, pre-existing or otherwise, could satisfy the subterfuge prong of the exemption. *Id.* at 219 n. 13.

an employee benefit plan, whether or not it predates the passage of the ADEA in 1967, may make distinctions between older and younger workers. The court of appeals would deny the protections of section 4(f)(2) to all bona fide employee benefit plans except those that base differences in benefits on age-related cost considerations.[12] But the language of section 4(f)(2), as well as relevant legislative history, both before and concurrent with the 1978 amendment, cannot justify the Sixth Circuit's distorted reading of an unambiguous statute.

A. The Language of Section 4(f)(2) Does Not Make Any Mention Of Age-Related Cost Considerations.

Section 4(f)(2) states that it shall not be unlawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

29 U.S.C. § 623(f)(2).

When inquiring into the meaning of legislation, "[a]bsent a *clearly* expressed legislative intention to the contrary, . . . [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission*, 447 U.S. at 108. (Emphasis added.) The starting point for interpreting statutory language is dictionary and ordinary usage. *See Pierce v. Underwood*, ___ U.S. ___, 108 S. Ct. 2541, 2549 (1988); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977). The dictionary and ordinary English usage define the term "any" to mean "[o]ne or another without restriction or exception . . . : All." *Websters II Riverside University Dictionary* 115 (1984). They define the phrase "bona fide" to mean "[a]uthentic, genuine, [that which is] performed or made in good faith."[13] *Id.* at 188. Although the dictionary does not refer to the phrase "employee benefit," one authoritative source has defined it as "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer." *See Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute,

---

[12] Some courts and the EEOC have taken the position that age-related cost considerations provide the only vehicle through which an employer may demonstrate that a bona fide employee benefit plan is not a "subterfuge" to evade the purposes of the Act. *See, e.g., Karlen v. City Colleges*, 837 F.2d 314 (7th Cir.), *cert. denied sub nom, Cook County College Teachers Union Local 1600 v. City Colleges of Chicago*, ___ U.S. ___, 108 S. Ct. 2038 (1988) (dicta); Brief for Appellant Equal Employment Opportunity Commission at 13 n. 8, 16-21, *EEOC v. Maine*, 823 F.2d 542 (1st Cir. 1987), *aff'g*, 644 F. Supp. 223 (D. Me. 1986). Other courts, such as the Sixth Circuit, perhaps to avoid the difficult task of reconciling the "age-related cost considerations" theory with *McMann's* definition of the term "subterfuge," inquire into the existence of age-related cost considerations for purposes of establishing whether the employee benefit plan at issue is the "type of plan" included within the section 4(f)(2) exemption. *See, e.g., EEOC v. Mt. Lebanon, Pennsylvania*, 842 F.2d 1480 (3d Cir. 1988); *see also EEOC v. Westinghouse Electric Co.*, 725 F.2d 211 (3d Cir. 1984), *cert. denied*, 469 U.S. 820 (1984). Either approach, however, is statutorily indefensible.

[13] Courts are in general agreement that a plan is bona fide when "it exists and pays substantial benefits." *See, e.g., Carpenter v. Continental Trailways*, 635 F.2d 578, 580 (6th Cir. 1980).

3d ed. 1987); *see also Websters II*, at 508. *Websters II* defines the term "plan" to refer to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898. And it defines the term "subterfuge" to refer to a "deceptive stratagem or device . . . so as to conceal, evade, or escape." *Id.* at 1156. Thus, based on the dictionary and ordinary usage of the phrase "any bona fide employee benefit plan" which is not a "subterfuge to evade the purposes of the" ADEA, any plan designed to provide employees with benefits unrelated to salary or wages is exempt from the prohibitions of the Act, provided the plan was not conceived to avoid the statute's specified purposes of facilitating the employment of older workers.

The same conclusion emerges when industrial relations practice is examined, *cf. California Brewers Ass'n. v. Bryant*, 444 U.S. 598, 604 (1980) (industrial relations practice examined to help interpret term "seniority system" in Title VII), where the term "employee benefit plan" refers, among other things, to profit-sharing plans, disability retirement plans, severance plans, savings plans, pension plans and insurance plans. *See, e.g., The Total Approach to Employee Benefits*, 83-124, 506 (A. Deric ed. 1967).[14]

Legislation in existence at the time the critical statutory language was enacted in 1967 further demonstrates that section 4(f)(2) was and is intended to have this broad scope. *See, e.g.*, section 3 of the Welfare and Pension Plans

---

[14] Even the EEOC's own regulations identify "[a]n 'employee benefit plan' . . . [as] a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.' " *See* 29 C.F.R. § 1625.10(b).

Disclosure Act of 1958 ("WPPDA"), 29 U.S.C § 302 (repealed 1974) (a-3) (defining the phrase "employee benefit plan" to include any "employee pension benefit plan" and "employee welfare benefit plan," including those intended to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment"); section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207 (e)(4) (a-2) (excluding employee benefits such as "contributions . . . for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees" from the calculation of "regular rate" of wages); *see also* section 2 (a) and (b) of the Service Contract Labor Standards Act of 1965, 41 U.S.C. § 351(a)(1) and (2) (a-6) (which makes similar distinctions between benefits provided by employee benefit plans and wages). The FLSA's provisions are especially significant in view of the fact that Congress modeled portions of the ADEA after the FLSA. *See Lorillard v. Pons*, 434 U.S. 575, 583-85 (1978). Thus, the use of the phrase "any bona fide employee benefit plan" in the ADEA indicates that Congress designed section 4(f)(2) to protect a myriad of employee benefit plans. *See id.* at 585; *see also Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("words which had at the time a well-known meaning . . . are presumed to have been used in that sense unless the context compels to the contrary").

That Congress modified the phrase "any bona fide employee benefit plan" with the phrases "such as any retirement, pension, or insurance plan" and "which is not a subterfuge to evade the purposes of [the Act]" does not undermine the conclusion that it intended the section 4(f)(2) exemption to be a broad one. The phrase "such as"

is "not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated by the standard." *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).[15] It merely provides examples of the plans protected by the exemption; it does not purport to define or qualify it. *Accord, Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

Even if the phrase "retirement, pension, or insurance plan" limited the coverage of section 4(f)(2) to those three types of benefit plans, nothing on the face of the statute suggests that Congress intended further modification by requiring that those plans be predicated on age-related cost considerations. *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983) (implied exceptions to a statute that is broad on its face viewed with disfavor). *Accord, Lewis v. United States*, 445 U.S. 55, 60 (1980). *See also Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, ___ U.S. ___, 108 S. Ct. 376, 381 (1987) (that a statute might be susceptible to more than one meaning "is not to conclude that all interpretations are equally plausible"). For example, retirement plans such as defined contributions pension plans and profit-sharing plans do not have age-related cost considerations.

Thus, according to *Black's Law Dictionary* 1021 (Fifth Ed. 1979), a pension plan is a "plan established and

---

[15] *See also Cronin v. Police Dep't*, 675 F. Supp. 847, 850 n. 3 (S.D.N.Y. 1987) (same); *Barber v. Gulf Publishing Co.*, 103 Lab. Cas. (CCH) 11,676 at 24,862 n. 5 (S.D. Miss. 1986) (same).

maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees . . . (usually for life) after retirement." ERISA supplies a similar definition for the phrase "employee pension benefit plan": [a plan that] "provides retirement income to employees. . . ." 29 U.S.C. § 1002(2)(A)(i). (a-6.)

The term "subterfuge" does qualify the exemption. However, it does so only by denying the exemption's protection to a plan that has been conceived with the specific intent of evading the ADEA's purpose – encouraging the hiring of older workers. *See McMann*, 434 U.S. at 203. *See also* 29 U.S.C. § 621(b).

With these straightforward definitions in mind, it is difficult to imagine how PERS disability retirement benefits can be considered anything other than a "bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes" of the Act. First, even the district court acknowledged that PERS disability retirement benefits are bona fide – they exist and pay substantial benefits. Second, PERS disability retirement benefits are clearly designed as a retirement or pension plan – they serve as a life-long source of income after an employee, who otherwise would not be entitled to retirement benefits, retires because of permanent disability. Third, they are not a subterfuge, not only because they predate passage of the ADEA, but because they do not discourage the hiring of older workers. Indeed, Betts was hired at the age of fifty-five and if not for her illness, would have been *entitled* to remain at her job. The plain language of section 4(f)(2), therefore, mandates that PERS disability retirement benefits be exempted from the proscriptions of the ADEA.

B. The Legislative History Associated With Section 4(f)(2), As Originally Enacted, Does Not Support The Conclusion That Age-Related Cost Considerations Are A Component Of The Section 4(f)(2) Exemption.

In 1964, Congress directed the Secretary of Labor to conduct an exhaustive study of the issue of age discrimination in the workplace and to present the results, as well as recommendations, to facilitate future congressional action to eliminate "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (1964). (Repealed 1972.) (a-8.) When issued, the Secretary's Report indicated that three factors were at the core of work-related age discrimination: (1) unfounded assumptions about the effect of age on ability to perform; (2) actual relationships between age and ability to do a job; and (3) "institutional arrangements" – employee benefit plans, such as pensions, seniority systems, and insurance arrangements. Although his report identified all three factors as the reasons underlying age discrimination in employment, the Secretary expressly identified only the first factor, decision-making based on unfounded assumptions concerning age and ability, as what Congress meant by "arbitrary age discrimination." *See "The Older American Worker: Age Discrimination in Employment," Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) ("Secretary's Report"), at 2; *see also EEOC Legislative History*, at 20.

Another finding in the Secretary's Report was that "[i]t is not clear to what extent [reluctance to hire older workers] arise[s] directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Secretary's Report*, at 16, *reprinted in EEOC Legislative History*, at 33. The Secretary reported that "cost

considerations do not . . . always operate against the older worker" and that "[r]elatively few employers . . . cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons. . . . [W]hat was cited was the company policy for excluding new employees beyond a certain age from coverage under pension plans . . . and in the case of insurance presumed inability to pass physical examinations." *Id.* at 16-17, *reprinted in EEOC Legislative History*, at 33-34.

In light of the Secretary's Report, several senators, led by Senator Javits, attempted to have the FLSA amended to eliminate age discrimination in respect to "terms, conditions, or privileges" of employment, except where age was an essential element of performance. *See* Senate Amendment No. 714 to H.R. 1371, 89th Cong., 2d Sess. (1966), *reprinted in EEOC Legislative History*, at 43.[16] Their effort, however, proved unsuccessful. Nevertheless, Congress directed the Secretary to prepare suggested legislation designed "to prevent arbitrary discrimination in employment because of age. . . ." *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830 (1966). (a-8.)

The Secretary responded on January 23, 1967, to Congress' directive by submitting the Johnson Administration's version of the ADEA. *See* 113 Cong. Rec. 1377 (Jan.

---

[16] Senators Javits, Murphy, Prouty and Griffin characterized "the imposition of arbitrary age limits on *hiring* . . . [as] the most serious, the most wasteful, and the least justifiable aspect of" age discrimination in employment. S. Rep. No. 1487, 89th Cong., 2d Sess. 79 (1966), *reprinted in EEOC Legislative History*, at 48. (Emphasis added.)

24, 1967), *reprinted in EEOC Legislative History*, at 62-63. Introduced by Senator Yarborough, the Administration's draft was aimed at "arbitrary" age discrimination in employment. It included the following narrow version of section 4(f)(2):

> It shall not be unlawful for an employer, employment agency, or labor organization –
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

Senator Javits, who previously had introduced his own bill, S. 788, was disturbed by the limited protection offered to employee benefit plans under the Administration's version of section 4(f)(2):

> the age discrimination law *should not be used as the place to fight the pension battle* but . . . we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (March 14, 1967) ("*Senate Hearings*"). (Emphasis added.) It was Senator Javits' intention to offer an amendment to the Administration's bill to afford employers "a degree of flexibility" in the area of employee benefit plans. *Id.* According to the Senator, a "fairly broad exemption . . . for bona fide retirement and seniority systems [was necessary] to facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of the Administration bill, also proposed an amendment to the age discrimination law:

> (g) Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for providing medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees.

Id. at 30. Senator Smathers' proposal, however, was not included by Congress in the ADEA.

Finally, Senator Murphy expressed support for the bill Senator Javits and he unsuccessfully sponsored in 1966, which made no provision for an exemption of any kind for employee benefit plans. *Senate Hearings*, at 32. He directed the committee's attention to the Secretary of Labor's conclusion that the cost of providing pension and insurance benefits was cited infrequently by employers as a deterrent to the hiring of older workers and a finding of the Bureau of Labor Statistics that the costs of health and insurance plans do not vary greatly with age. Senator Murphy suggested, therefore, that the cost associated with providing employee benefits to older workers was exaggerated. *Id.* at 34.

Despite reassurances by the Secretary of Labor that the Administration's version of section 4(f)(2) would offer broad protection to employee benefit plans, *see id.* at 53, Senator Javits, apparently parting company on this issue with his former ally, Senator Murphy, was still concerned that the Administration's bill would disrupt employee benefit plans and would have the unintended effect of discouraging the employment of older workers. *See* 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in*

EEOC Legislative History, at 71. Senator Javits offered the following substitute for the Administration's version of section 4(f)(2), providing that an employer would still be in compliance with the new age discrimination law if he observed

> a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of the Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72. It was not Senator Javits' intention to dismiss the importance to older workers of receiving adequate employee benefits. *See id.*, *reprinted in EEOC Legislative History*, at 71. He reiterated, however, that "the age discrimination law is not the proper place to fight this particular battle." *Id.*

Significantly, at the time Congress was deliberating over the age discrimination law, Senator Javits had "introduced a comprehensive bill to deal with . . . [the pension] problem." *Id.* The bill, which predated ERISA, identified each of the following items as an "employee benefit plan":

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the cost of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any

> other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967). Two other bills introduced on this subject, one by Senator Yarborough, also defined the phrase "employee benefit plan" quite broadly. *See* H.R. 5741, 90th Cong., 1st Sess. (1967); S. 1024, 90th Cong., 1st Sess. (1967).

The version of section 4(f)(2) that emerged from committee contained the following language, still part of the ADEA today:

> It shall not be unlawful for an employer, employment agency, or labor organization . . .
>
> * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this [chapter], except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

See H.R. 13054, at 6, published in H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967), *reprinted in EEOC Legislative History*, at 94. The House Committee report explained in unequivocal terms the purpose and scope of the exemption:

> It is important to note that [section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill – hiring of older workers – by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. 805, *reprinted in EEOC Legislative History*, at 77. The bill next was reported favorably to the Senate and

accompanied by a Senate committee report addressing essentially in the same terms the justifications underlying the exemption. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in EEOC Legislative History*, at 108.

Senator Javits applauded the Committee's results, noting how "the bill . . . [had] . . . been improved by the adoption of language . . . exempting . . . bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions. The lack of any such provision was a serious defect [in the Administration's bill]. . . ." Individual views of Senator Javits, S. Rep. No. 723, 90th Cong., 1st Sess. 4, 14 (1967), *reprinted in EEOC Legislative History*, at 118. Javits continued that in the "absence [of such a provision] employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them." *Id.*

The broad scope of this latest version of section 4(f)(2) was communicated to the Senate by Senator Javits during a discussion with Senator Yarborough, the floor manager of the bill. *See* 113 Cong. Rec. 31255 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 146 (of importance to the business community was the fact that employers "will not be compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act. . . ."). Members of the House, including Representative Perkins, floor manager of House Bill H.R. 13054, also demonstrated that they were aware that section 4(f)(2), as amended, would apply to the full range of employee benefit plans, even those that excluded older workers. *See*

remarks of Representative Perkins, 113 Cong. Rec. 34740 (December 4, 1967), *reprinted in EEOC Legislative History*, at 151. (ADEA provided "exceptions to prevent disruption of employee benefit programs, seniority systems and the like"). *See also* remarks of Representative Randall, 113 Cong. Rec. 34750 (December 4, 1967), *reprinted in EEOC Legislative History*, at 161 (ADEA contained "no provision for [older workers] . . . to participate in some of the pension or retirement programs available to [his] fellow workers"). At least one member of the House opposed the new age discrimination law precisely because it allowed older workers to be excluded entirely from existing benefit plans. *See* remarks of Representative Smith, 113 Cong. Rec. 34745 (December 4, 1967), *reprinted in EEOC Legislative History*, at 156. Despite these concerns, the bill, including the amended version of section 4(f)(2), was passed in both houses of Congress and signed into law by the President.

The preceding legislative history reflects that in 1967 Congress, first and foremost, wished to address misconceptions concerning the competence of older workers. The legislature was intent on eliminating this "arbitrary" age discrimination by requiring the hiring of employees regardless of age.

But Congress was also sensitive to the needs of employers and willing to compromise on the issue of employee benefits in order to facilitate hiring. Thus, Congress chose not to utilize the ADEA as a weapon for "fighting the pension battle." Instead, it created an exemption for bona fide employee benefit plans designed to encourage the cooperation of employers.

The scope of this exemption did not evolve without debate. Congress had before it several alternative versions of the exemption, including the offerings of the

Administration, Senator Smathers, and Senator Javits. In addition, Congress had the option of abandoning altogether the idea of an exemption, the route apparently favored by Senator Murphy.

Senator Murphy's view, however, garnered little support. In addition, neither the Administration's proposal, which was narrower in scope than the amendment offered by Senator Javits, nor Senator Smathers' suggested amendment, which gave Congress the opportunity to embrace the "age-related costs" test as the exclusive method for satisfying the terms of the exemption, were adopted.

Instead, Congress passed, with modest stylistic changes, Senator Javits' proposal. This version of section 4(f)(2) clearly was the most expansive. Legislative debate reveals that members of Congress understood that the Javits amendment might result in the exclusion[17] of older workers from various benefit plans. Moreover, Senator Javits' concept of what qualified as an "employee benefit plan" was evident from the definition of that term contained in the pension bill he proposed almost simultaneously with the introduction of his version of section 4(f)(2).

It is true that the reason an employee benefit plan exemption was necessary may have varied from legislator to legislator. One of Senator Javits' concerns appears

---

[17] No one is excluded from membership in the Public Employees Retirement System because of age. Although a worker age sixty or older may not apply for disability retirement benefits, he is eligible for age and service retirement benefits regardless of his age at the time he was hired, provided, as is true of all PERS members, he has accumulated at least five years of service credit. *See* O.R.C. § 145.33. (a-13.)

to have been employer costs, while there is significant evidence that the practice of excluding older persons from pension plans was the employer concern that the exemption was intended to address.

Whether the exemption was designed to deal with one or a combination of these factors, Congress wanted to dismantle barriers to the hiring of older workers. It did so by making it unlawful for employers to refuse to hire anyone because of age and by exempting from the Act's coverage the full panoply of employee benefit plans that otherwise might have discouraged employers from becoming full partners in the effort to eliminate arbitrary age discrimination. The overwhelming tone of the legislative history to the ADEA as originally enacted refutes any suggestion that Congress intended to limit this partnership by restricting the universe of employee benefit plans included within the perimeters of the exemption to those whose different treatment of older workers was predicated on age-related cost considerations.

C. The Legislative History Associated With The 1978 Amendment To Section 4(f)(2) May Not Be Relied On To Interject An Age-Related Cost Considerations Requirement Into Section 4(f)(2).

As with the Sixth Circuit's conclusion concerning the continuing vitality of *McMann*, whatever authority there might be for the appellate court's position concerning age-related cost considerations must be gleaned from the legislative history of the 1978 amendment invalidating involuntary retirement provisions. The 1978 amendment to section 4(f)(2) had its genesis in a conflict between the courts of appeals. The Third and Fifth Circuits had ruled that involuntary retirement provisions were lawful under

section 4(f)(2). *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) and *Zinger v. Blanchette*, 549 F.2d 217 (4th Cir. 1976). The Fourth Circuit took the opposite view. *See McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976).

On July 25, 1977, the House Committee on Education and Labor suggested an amendment to section 4(f)(2) prohibiting involuntary retirement because of age. *See* H.R. 5383, 95th Cong., 1st Sess. (July 25, 1977), *reprinted in EEOC Legislative History*, at 392. The committee made it clear that its bill would "not require any additional benefits, benefit accruals or actuarial adjustments . . . other than those required under ERISA." *See* H.R. Rep. No. 527, 95th Cong., 1st Sess. 8-9 (1977), *reprinted in EEOC Legislative History*, at 361. Representative Weiss expressed the view that the sole effect of the amendment would be to make involuntary retirement unlawful. *See id.* at 26-30, *reprinted in EEOC Legislative History*, at 386-90. Representative Weiss contended that prohibiting involuntary retirement was consistent with the statute's original purposes of promoting employment of older workers without disrupting existing plans. *Id.* at 26-27, *reprinted in EEOC Legislative History*, at 386-87. Employers would still be authorized to establish the "age at which full benefits are received," as well as "the amount of benefits" because the "amendment to section 4(f)(2) does not effect [sic] the cost or structure of bona fide pension plans which conform to ERISA or other IRS regulations." *Id.* at 28-29, *reprinted in EEOC Legislative History*, at 388-89.

The Senate Committee on Labor and Human Resources reported a similar bill to the Senate on October 12, 1977. *See* H.R. 5383, 95th Cong., 1st Sess. (1977). The Senate committee report expressed its approval of the

result reached by the Fourth Circuit in *McMann*, invalidating an involuntary retirement provision. *See* S. Rep. No. 493, 95th Cong., 1st Sess. 9-10 (1977), *reprinted in EEOC Legislative History*, at 434. The committee also stated that

> [P]resently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.

Id. at 5, *reprinted in EEOC Legislative History*, at 438.

Senator Williams, floor manager of the bill in the Senate stated that:

> Under section 4(f)(2) of the act, an employer is not compelled to afford older workers exactly the same pension, retirement or insurance benefits as he affords younger workers, provided that any difference in these benefits is not a subterfuge for age discrimination. This bill would not alter existing law with respect to these practices.
>
> * * *
>
> . . . [t]he purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or disability benefit plans. Of course, there must be some reason other than age which justifies the unequal benefits. . . . But the application of a mandatory retirement provision contained in a seniority system or employee benefit plan makes no such valid distinction. Rather it takes away an individual's right to employment solely because of his or her age. That is age discrimination plain and simple[.]

123 Cong. Rec. 34295 (Oct. 19, 1977), *reprinted in Legislative History*, at 482. Senator Kennedy expressed similar views:

> [The amendment to section 4(f)(2)] clarifies the congressional intention behind the exception to the act which allows lesser benefits to be given to older workers in pension, retirement, and insurance plans. The purpose of this provision was to ease the way for employment of older workers by allowing some differentiation in the fringe benefits that they would get. . . . We now make it clear that the differentiation is allowed for purposes of fringe benefits alone and is not for purposes of allowing an earlier retirement age.

123 Cong. Rec. 34323 (Oct. 19, 1977), *reprinted in EEOC Legislative History*, at 510.

While a House-Senate conference committee was considering each chamber's bill, the Supreme Court issued its decision in *McMann*. Several months thereafter, the Conference Committee released its report, including the remarks alluded to in the Sixth Circuit's opinion in this case and discussed earlier in this brief:

> The conferees agree that *the purpose of the amendment* to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that *the exception does not authorize an employer to require or permit involuntary retirement*. . . . In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary. . . . The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8 (March 14, 1978), *reprinted in EEOC Legislative History*, at 519. (Emphasis added.)

Floor debate of the bill approved by the conference committee began in the House when Representative Hawkins called up the Conference Committee report on March 21, 1978. *See* 124 Cong. Rec. 7880 (March 21, 1978), *reprinted in EEOC Legislative History*, at 527. In the words of Mr. Hawkins, "the purpose of this amendment is to make absolutely clear that [section 4(f)(2)] does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in EEOC Legislative History*, at 528. He noted further that "[c]ontrary to the Supreme Court's rationale, this amendment makes clear that regardless of when an involuntary retirement provision in a plan became effective – before or after the enactment of the ADEA or of these amendments – it is unlawful if it is triggered by the fact that an employee reaches an age within the protected group." *Id.* Representative Weiss concurred in this assessment. *See* 124 Cong. Rec. 7887 (March 21, 1978), *reprinted in EEOC Legislative History*, at 534.

Finally, Representative Waxman, a co-author of the 1978 amendment to section 4(f)(2), noted that the amendment prohibited involuntary retirement. He further noted that in originally enacting section 4(f)(2), "Congress feared that requiring participation of older workers in benefit plans would discourage employment of newly hired older workers." 124 Cong. Rec. 7888 (March 21, 1978), *reprinted in EEOC Legislative History*, at 535. But Representative Waxman was "hopeful" that the 1978 amendment prohibiting involuntary retirement provisions would not lead "employers [to] terminate capable and healthy older workers from benefit plans solely on the basis of age. . . ." *Id.* Representative Waxman based

this "hope" on his opinion that, "[i]n the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purpose of the Act." *Id.* He conceded, however, that, in 1978, "the conference committee did not specifically address the status of health benefits to older workers protected by this act. . . ." *Id.*

In the Senate, Senator Williams called up the Conference Committee report and explained that the amendment insured that "pension plans or seniority systems which require mandatory retirement may no longer be applied to employees covered by the act." 124 Cong. Rec. 8217 (March 23, 1978), *reprinted in EEOC Legislative History*, at 538. Senator Javits then stated that "[t]he amendment to the section 4(f)(2) exception is intended to overrule the *McMann* decision" and to make involuntary retirement unlawful. 124 Cong. Rec. 8218-19 (March 23, 1978), *reprinted in EEOC Legislative History*, at 539. Finally, Senator Javits stated:

> I want to emphasize that these amendments do not change present law regarding these practices, as the Senate report states:
>
> Existing principles of law, including the section 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.
>
> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus, a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage. This is consistent with the following statement I made during the November 6, 1967 floor consideration of the original act[.]

This legislative history, including Senator Javits' final comment,[18] cannot properly be used to add an age-related cost considerations limitation to the section 4(f)(2) exemption. The legislative debate principally focused on the involuntary retirement issue. Those voting for the amendment purported only to be rendering involuntary retirement provisions unlawful. They did not purport to be addressing the lawfulness of any other employee benefit plan practice. On the contrary, it was stressed that, with the exception of abolishing involuntary retirement provisions, the amendment to section 4(f)(2) "would not alter existing law with respect to these practices." *See e.g.*, S. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), *reprinted in EEOC Legislative History*, at 438; 123 Cong. Rec. 34295 (October 19, 1977), *reprinted in EEOC Legislative History*, at 482. That existing law included an appellate decision expressly rejecting the age-related cost considerations limitation. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215-17 (5th Cir. 1974).

---

[18] Because Senator Javits was a principal sponsor in 1967 of section 4(f)(2), it may seem that his views should be afforded some weight. *See Consumer Product Safety Commission*, 447 U.S. at 118-19. But, "as time passes, memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Id.* at 118 n. 13.

It is true that in discussing their support for the 1978 amendment, several members of Congress offered their own interpretations of the extent of the section 4(f)(2) exemption, suggesting that a plan providing unequal benefits must have some reason other than age as a justification for the differentiation; indeed, Senator Javits and Representative Waxman suggested that these benefit variances must have age-related cost justifications. But these comments were not directed to the meaning of the amendment that Congress was enacting in 1978. Rather, they were directed to the meaning of section 4(f)(2) as originally enacted in 1967. Such "[l]egislative observations 10 years after passage of the Act are in no sense part of the legislative history" of the 1967 enactment. *McMann*, 434 U.S. at 200 n. 7. Thus, they cannot be used to modify the otherwise clear meaning of the original statutory language. *Id. Accord, Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); *see also Mackey v. Lanier Collections Agency & Service, Inc.*, ___ U.S. ___, 108 S. Ct. 2182, 2190 (1988); *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

Although a plan does not have to be predicated on age-related cost considerations[19] in order to qualify for

---

[19] Even if an age-related cost considerations theory was adopted as a rule of general application, PERS disability retirement benefits should still be entitled to the protections of section 4(f)(2) because they are an integral component of a bona fide retirement and pension plan. *See, e.g., Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

the exemption, an employer with a bona fide employee benefit plan would still have to demonstrate that the plan is not a "subterfuge to evade the purposes of" the ADEA. But the inquiry would turn, as reflected by the "intent" component of section 4(f)(2), on subjective, as well as objective factors. *See McMann*, 434 U.S. at 203; *accord, EEOC v. Mt. Lebanon, Pennsylvania*, 842 F.2d 1480, 1494-95 (3d Cir. 1988). (Hutchinson, J., concurring.)[20] Although data concerning the cost of a program may be relevant evidence, the fact that differences in the treatment of older and younger workers are not the product of age-related cost considerations should not preclude an employer from demonstrating through other evidence that a plan was not intentionally designed to circumvent the purposes of the ADEA.[21]

The purposes of the ADEA are contained in Section 2(b) of the Act, 29 U.S.C. § 621(b):

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Thus, an otherwise bona fide employee benefit plan is a subterfuge to evade the purposes of the ADEA when it is

---

[20] The majority of the Third Circuit panel in *Mt. Lebanon* relied on age-related cost considerations to reverse the district court's grant of summary judgment for an employer with a post-1967 plan.

[21] One way in which an employer could demonstrate that its plan is not a subterfuge to evade the purposes of the ADEA would be through evidence that the plan predated the passage of the Act. *McMann*, 434 U.S. at 203.

utilized to frustrate the efforts of a person protected by the ADEA to secure or retain employment or qualify for promotion because of age, or to perpetuate misconceptions about age and ability. Any employer who utilizes a plan with either or both of these illicit goals in mind should forfeit the protections of section 4(f)(2).

PERS disability retirement benefits, however, are not designed to evade the purposes of the ADEA. As the district court noted, they are intended to provide income for permanently disabled workers who otherwise would have no source of income. They do not discourage the hiring, retention, or promotion of older workers, as evidenced by the fact that Betts was hired at the age of fifty-five and was retained as long as her health permitted. Affording the protection of section 4(f)(2) to PERS' plan will fully serve the purposes of the ADEA without constricting the scope of the exemption in a manner inconsistent with its plain language and legislative history.

CONCLUSION

For the reasons set forth above, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Attorneys for Appellant

Of Counsel:

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

29 U.S.C. § 207

(e) Definition of "regular rate" of employment

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include-

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such

talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

---

29 U.S.C. § 302 (1958) (Repealed 1974)

DEFINITIONS

Sec. 2. (a) When used in this Act-

(1) The term "employee welfare benefit plan" means any plan, fund, or program which is communicated to or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

(2) The term "employee pension benefit plan" means any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both for the purpose of providing for its participants or their beneficiaries by the purchase of insurance or annuity contracts or otherwise, retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement.

(3) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee welfare or pension benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary

association organized for the purpose, in whole or in part, of establishing such a plan.

(4) The term "employer" means any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee welfare or pension benefit plan, and includes a group or association of employers acting for an employer in such capacity.

(5) The term "employee" means any individual employed by an employer.

(6) The term "participant" means any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan, or whose beneficiaries may be eligible to receive any such benefit.

(7) The term "beneficiary" means a person designated by a participant or by the terms of an employee welfare or pension benefit plan who is or may become entitled to a benefit thereunder.

(8) The term "person" means an individual, partnership, corporation, mutual company, joint-stock company, trust, unincorporated organization, association, or employee organization.

(9) The term "State" means any State of the United States, the District of Columbia, Hawaii, Puerto Rico, the Virgin Islands, and the Canal Zone.

(10) The term "commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place outside thereof.

(11) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce.

---

29 U.S.C. § 623(a)(1)

It shall be unlawful for an employer –

to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

---

29 U.S.C. § 623(f)(2)

It shall not be unlawful for an employer, employment agency, or labor organization –

* * *

to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

---

29 U.S.C. § 1002(2)(A)(i)

Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees,

---

41 U.S.C. § 351(a)(1) and (2)

Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such

wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

---

42 U.S.C. § 2000e-14 (1964) (Repealed 1972)

The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 606, 80 Stat. 830 (Sept. 23, 1966)

The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967 his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. 95-256, § 2(a) and (b), 92 Stat. 189 (1978)

SEC. 2. (a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual".

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

Ohio Rev. Code § 145.23

The funds hereby created are the employees' savings fund, the employers' accumulation fund, the annuity and pension reserve fund, the income fund, the survivors' benefit fund, and the expense fund.

(A) The employees' savings fund is the fund in which shall be accumulated contributions from the earnable salaries of contributors for the purchase of annuities or retirement allowances.

The accumulated contributions of a contributor returned to him upon his withdrawal, or paid to his estate or designated beneficiary in the event of his death, shall be paid from the employees' savings fund. Any accumulated contributions forfeited by failure of a member, or his estate, to claim the same, shall be transferred from the employees' savings fund to the income fund. The accumulated contributions of a contributor shall be transferred from the employees' savings fund to the annuity and pension reserve fund in the event of his retirement.

(B) The employers' accumulation fund is the fund in which shall be accumulated the reserves for the payment of all pensions payable as provided in this chapter. The amounts paid by the state of Ohio and by any employer defined in division (A) of section 145.01 of the Revised Code because of the normal contributions and deficiency contributions shall be credited to the employers' accumulation fund.

Any payments made into the employers' accumulation fund by a member as provided in section 145.31 of the Revised Code shall be refunded to such member under the conditions specified in section 145.40 of the Revised Code.

Upon the retirement of a contributor the full amount of his pension reserve shall be transferred from the employers' accumulation fund to the annuity and pension reserve fund.

(C) The annuity and pension reserve fund is the fund from which shall be paid all pensions, retirement allowances, annuities, and benefits in lieu thereof,

because of which reserves have been transferred from the employees' savings fund and the employers' accumulation fund.

Any member may deposit in the employees' savings fund, subject to rules established from time to time by the public employees retirement board, such amounts as the member desires, and the member, at the time of age and service or commuted age and service retirement, shall receive in return therefor, at the option of the member, either an annuity having a reserve equal to the amount deposited or a cash refund of such amounts together with such interest as may have been allowed by the public employees retirement board at the end of each calendar year. Such deposits for additional annuity together with such interest as may have been allowed by the public employees retirement board at the end of each calendar year shall be refunded in the event of death prior to retirement or withdrawal of accumulated contributions as provided in sections 145.40 and 145.43 of the Revised Code or upon application of the member prior to age and service retirement.

(D) The income fund is the fund from which interest is transferred and credited on the amounts in the funds described in divisions (B), (C), and (F) of this section, and is a contingent fund from which the special requirements of the funds may be paid by transfer from this fund. All income derived from the investment of funds by the public employees retirement board as trustee under section 145.11 of the Revised Code, together with all gifts and bequests, or the income therefrom, shall be paid into this fund.

Any deficit occurring in any other fund which will not be covered by payments to that fund, as otherwise provided in Chapter 145. of the Revised Code, shall be paid by transfers of amounts from the income fund to such fund or funds. If the amount in the income fund is insufficient at any time to meet the amounts payable therefrom, the amount of the deficiency, with regular interest, shall be paid by an additional employer rate of contributions as determined by the actuary, not to exceed fourteen per cent, and the amount of the additional employer contribution shall be credited to the income fund.

The public employees retirement board may accept gifts and bequests. Any funds that may come into possession of the public employees retirement board in this manner, or which may be transferred from the employees' savings fund by reason of lack of claimant, or any surplus in any fund created by this section, or any other funds whose disposition is not otherwise provided for, shall be credited to the income fund.

(E) The expense fund is the fund from which shall be paid the expenses of the administration of this chapter, exclusive of amounts payable as retirement allowances and as other benefits.

(F) The survivors' benefit fund is the fund from which shall be paid dependent survivor benefits provided by section 145.45 of the Revised Code.

Ohio Rev. Code § 145.33

(A) A member, other than a member who qualifies for and elects to receive benefits under division (B), (C), or (E) of this section, with at least five years of total service credit and who has passed his sixtieth birthday, or who has thirty years of total Ohio service credit, may apply for age and service retirement which shall consist of:

(1) An annuity having a reserve equal to the amount of the member's accumulated contributions at that time;

(2) A pension equal to the annuity provided by division (A)(1) of this section;

(3) An additional pension, if the member can qualify for prior service, equal to forty dollars multiplied by the number of years, and fraction thereof, of such prior and military service credit;

(4) A basic annual pension equal to one hundred and eighty dollars, if the member has ten or more years of total service credit as of October 1, 1956, except that such basic annual pension shall not exceed the sum of the annual benefits provided by divisions (A)(1), (2), and (3) of this section. The cost of such basic annual pension shall be included in the deficiency contribution provided by sections 145.48 and 145.50 of the Revised Code.

(5) When a member retires on age and service retirement, his total annual single lifetime allowance, including the allowances provided in divisions (A)(1), (2), (3), and (4) of this section, shall be not less than a base amount determined by multiplying his total Ohio service

credit by the greater of eighty-six dollars or two and one-tenth per cent of his final average salary, which shall be adjusted by the factors of attained age or years of service to provide the greater amount as determined by the following schedule:

Attained Birthday	Or	Years of Total Service Credit	Percentage of Base Amount
58		25	75
59		26	80
60		27	85
61			88
		28	90
62			91
63			94
		29	95
64			97
65		30 or more	100

Members shall vest the right to a benefit in accordance with the following schedule, based on the member's attained age by September 1, 1976:

Attained Birthday	Percentage of Base Amount
66	102
67	104
68	106
69	108
70 or more	110

(6) The total annual single lifetime allowance that a member shall receive under division (A)(5) of this section shall not exceed ninety percent of his final average salary.

(B)(1) A member who has at least twenty-five years of total service credit, including credit for military service

under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who has passed his fifty-second birthday, may apply for an age and service retirement benefit, which shall consist of an annual single lifetime allowance equal to the sum of two and one-half percent of his final average salary multiplied by the first twenty years of his total service, plus two percent of his final average salary multiplied by each of his twenty-first to twenty-fifth years of service, plus one and one-half percent of his final average salary multiplied by the number of years of his total service credit in excess of twenty-five years, except that no allowance shall exceed seventy-two percent of his final average salary.

(2) A member who has at least fifteen years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and has attained sixty-two years of age, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance computed as provided in division (B)(1) of this section.

(C) A member with at least fifteen years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who voluntarily resigns or is discharged from his position for any reason except his retirement under this chapter, his death, dishonesty,

cowardice, intemperate habits, or conviction of a felony, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance equal to one and one-half percent of his final average salary multiplied by the number of years of his total service credit. This allowance shall commence on the first day of the calendar month following the month in which the application is filed with the public employees retirement board on or after the attainment by the applicant of age fifty-two.

(D)(1) If after March 4, 1975, a member withdraws any part or all of his accumulated contributions from the employees' savings fund, he shall forfeit any right to a pension under division (B) or (C) of this section. A member enrolled in division (B) or (C) of this section may elect to receive benefits under division (A) of this section if his service credit, either jointly or independently, would qualify for benefits under division (A) of this section.

(2) Notwithstanding sections 145.01 and 145.30 of the Revised Code, no more than four years of military service credit granted under section 145.30 of the Revised Code and five years of military service credit purchased under section 145.301 [145.30.1] of the Revised Code shall be used in calculating service as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent, or the total service credit of such person.

(3) Only credit for his service as a deputy sheriff, sheriff, or township constable or police officer in a township police department or district, or county narcotics agent, or service credit purchased as a policeman or state

highway patrolman shall be used in computing the benefits under divisions (B), (C), and (E) of this section for any person who is originally commissioned and employed as a deputy sheriff by the sheriff of any county, or who is originally elected sheriff, on or after January 1, 1975, any person who is originally appointed as a township constable or police officer in a township police department or district, on or after January 1, 1981, and any person who is originally employed as a county narcotics agent on or after September 26, 1984.

(E) A member who has at least twenty-five years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent and who voluntarily resigns or is discharged from his position for any reason except his retirement under this chapter, his death, dishonesty, cowardice, intemperate habits, or conviction of a felony, may, on or after the date he attains forty-eight years of age but before the date he attains fifty-two years of age, elect to receive a reduced benefit as determined by the following schedule:

ATTAINED AGE	*REDUCED BENEFIT*
48	seventy-five per cent of the benefit payable under division (B) of this section
49	eighty per cent of the benefit payable under division (B) of this section
50	eighty-six per cent of the benefit payable under division (B) of this section

51 ninety-three per cent of the benefit payable under division (B) of this section

A member who has at least twenty-five years of total service credit, including credit for military service under division (D)(2) of this section, while serving as a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent may, upon attaining forty-eight, forty-nine, fifty, or fifty-one years of age, elect to retire and receive a reduced benefit determined by the above schedule.

In the case of a member who elects to receive a reduced benefit on or after the date he attains forty-eight years of age but before the date he attains forty-nine years of age, the reduced benefit is payable from the date he attained forty-eight years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains forty-nine years of age but before the date he attains fifty years of age, the reduced benefit is payable from the date he attained forty-nine years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains fifty years of age but before the date he attains fifty-one years of age, the reduced benefit is payable from the date he attained fifty years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later. In the case of a member who elects to receive a reduced benefit on or after the date he attains fifty-one years of

age but before the date he attains fifty-two years of age, the reduced benefit is payble from the date he attained fifty-one years of age or from the date he becomes eligible to receive the reduced benefit, whichever is later.

Once a member elects to receive a reduced benefit determined by the above schedule and has received a payment, he may not reelect to change such election.

If a member who has resigned or been discharged has left on deposit his accumulated contributions in the employees' savings fund and has not elected to receive a reduced benefit determined by the above schedule, he shall, upon attaining fifty-two years of age, be entitled to receive a benefit computed and paid under division (B) of this section.

Ohio Rev. Code § 145.34

Any member who has completed twenty-five years of total service and has attained his fifty-fifth birthday, may retire on a commuted age and service allowance. Upon retirement on a commuted age and service allowance on or after September 30, 1963, a member shall be granted a retirement allowance consisting of:

(A) An annuity having a reserve equal to the amount of the member's accumulated contributions at that time;

(B) A pension equal to the annuity provided by division (A) of this section;

(C) An additional pension, if such member can qualify for prior service credit, the reserve for which, based upon regular interest and the service tables approved by the board, shall be the present worth of the reserve required for the payment of the prior service pension provided by section 145.33 of the Revised Code, after either sixty years of age or thirty years of Ohio service credit, whichever can be attained first. The annual prior service pension shall be determined by the amount of such commuted reserve divided by the age and service annuity rate for the attained age at retirement;

(D) The commuted value calculated as provided in division (C) of this section of a basic annual pension of one hundred eighty dollars, providing the member has ten or more years of total service credit as of October 1, 1956. The cost of the basic annual pension shall be included in the deficiency contribution.

(E) When a member retires on commuted age and service retirement, his single lifetime allowance shall not be less than that provided by divisions (A), (B), (C), and (D) of this section and division (A)(5) of section 145.33 of the Revised Code.

A year of service for the purpose of commuted age and service retirement and of applying the minimum retirement allowance as provided in this section is defined as a complete year of full-time employment, or the equivalent thereof. The board is the final authority in determining the eligibility of an employee for such form of retirment and for such minimum allowance.

In determining eligibility only for retirement under this section the board shall include in "total service" the

years of prior service credit granted members of the public employees retirement system by a publicly-owned utility as provided for in section 145.48 of the Revised Code under a pension plan adopted by the publicly-owned utility.

Ohio Rev. Code § 145.35

Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program. Application must be made within two years from the date the member's contributing service terminated, unless the disability has existed in some degree as evidenced by medical records, before the member's contributing service was terminated. Application may not be made by or for any person receiving age and service retirement benefits under section 145.33, 145.34, or 145.37 of the Revised Code or any person who, pursuant to section 145.40 of the Revised Code, has been paid the accumulated contributions standing to the credit of his individual account in the employees' savings fund. The application shall be made on a form provided by the public employees retirement board. Any member who is approved for disability retirement shall be placed on retirement as of the first day of the month immediately following the later of:

(A) The last day for which compensation was paid; or

(B) The attainment of eligibility for benefits provided under this section.

Medical examination of a member who has applied shall be conducted by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent. The disability must have occurred since last becoming a member or have increased since last becoming a member to such extent as to make the disability permanent or presumed to be permanent.

If the physician or physicians determine that the member qualifies for retirement by reason of disability, and the board concurs with such determination, the member shall be retired for disability and the action of the board shall be final.

In the event an employer files a disability retirement application to retire a member on disability retirement as a result of his having been separated from service because he is considered to be mentally or physically incapacitated for the performance of his present duty, and the physician or physicians selected by the board reports to the board that the member is physically and mentally capable of performing service similar to that from which he was separated and the board concurs in the report, the board shall so certify to the employer and the employer shall restore the member to his previous position and salary or to a similar position and salary.

Ohio Rev. Code § 145.36

Upon disability retirement, a retirant shall receive a retirement benefit in an annual amount which shall consist of:

(A) An annuity having a reserve equal to the amount of the retirant's accumulated contributions;

(B) A pension which shall be the difference between his annuity and an annual amount determined by multiplying the total service credit of the retirant, and in addition thereto the projected number of years and fractions thereof between the effective date of his disability retirement and attained age sixty, assuming continuous service, by eighty-six dollars and two and one-tenth per cent of his final average salary whichever is greater. Where the retirant does not retire for disability under the provisions of section 145.37 of the Revised Code and is receiving a disability retirement benefit from either the state teachers retirement system or the school employees retirement system, then the retirant shall not be eligible for service credit based upon the number of years and fractions thereof between the date of disability and attained age sixty as provided for in this division. In no case shall a disability retirement benefit be less than thirty per cent or more than seventy-five per cent of his final average salary.

A year of service for the pupose of disability retirement is a complete year of full-time employment, or the equivalent thereof. The public employees retirement board is the final authority in determining the eligibility of a member for such form of retirement.

Ohio Rev. Code § 145.381

(A) A former member receiving a retirement allowance, other than a disability allowance, from this system, and hereafter referred to as a retirant, may be elected to an office of this state or any political subdivision or employed, anything contained in Chapter 145. of the Revised Code to the contrary notwithstanding, provided that during an elective term of office, membership in the public employees retirement system is not permitted, except that retirants elected to an office of the state who were elected state officials when they retired may elect to establish membership in the system, or may elect to receive both the pension and the annuity portion of their retirement allowance and, if they so elect, may not establish membership in the system. If such an official elects to establish membership in the system, he shall be considered an employee as provided in division (C) of this section except that he need not have been retired for at least eighteen months. For purposes of this section, except when he elects otherwise under this division, a retirant who is retired for not less than two months and who is elected or appointed to an elective office of this state or any political subdivision is not considered employed, provided, the retirant who is reelected to the office which he previously held, shall be retired for not less than eighteen months. He shall continue to receive both the pension and the annuity portion of his retirement allowance while serving in an elective position; if however he submits in writing to the official of the state or subdivision with responsibility for the payment of

compensation for his elected office a waiver of the compensation to which he would otherwise be entitled, he shall continue to receive the full amount of his benefit under section 145.33 of the Revised Code.

(B) A retirant may be employed in a temporary capacity, not to exceed fifty-nine work days, or four hundred seventy-two hours, whichever is the lesser, within any calendar year, provided:

(1) The retirant has received a retirement allowance for at least two months.

(2) When employment does not exceed the limits of this division, there shall be no suspension or forfeiture of the allowance.

(3) Membership in the retirement system shall not be allowed a retirant employed under this division.

(C) A retirant may be regularly employed in full-time employment covered by this system provided he has received his retirement allowance for at least eighteen months. When a retirant is so employed:

(1) The employer shall notify the retirement board of such employment before the end of the month then current and any overpayment of allowance resulting from lack of notice shall be charged to the employer;

(2) The pension portion of the retirement allowance shall cease on the first day of the month following the date of such employment and shall thereafter be forfeited until the first day of the month following the termination of such employment;

(3) The annuity portion of the retirement allowance shall be suspended on the first day of the month following such employment, and thereafter shall accumulate to the credit of the retirant to be paid in one sum after his employment is terminated;

(4) Such an employee shall become a new member with all privileges and obligations of such membership, except that such new membership beginning on or after July 1, 1955, shall not include the survivor benefit rights provided by section 145.45 of the Revised Code.

(5) Upon service termination, a retirant may receive a refund of retirement deductions taken from his earnable salary during his re-employment, or he may receive a supplemental retirement allowance, based on contributions and service credit accrued subsequent to his termination of benefits.

(D) A retirant shall not receive a retirement allowance for any period for which he is compensated under a contract or other arrangement whereby he is to perform personal or professional services for the employer by which he was employed at the time of retirement, except that in a time of critical need the director of the department of administrative services may exempt from the provisions of this section medical doctors who are licensed to practice in this state, who have been employed by the department of mental health or the department of mental retardation and developmental disabilities, and who have retired from the department, to continue to provide, under contract, professional services in department institutions. Notice of each such exemption shall be filed with the secretary of state and the

public employees retirement system by the director of administrative services. Each exemption shall continue for a period of one year and may be renewed under the procedures for the original exemption.

(E) The public employees retirement board may make rules to carry the provisions of this section into effect and to prevent abuse of the rights granted.

Ohio Rev. Code § 145.39

A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter. The public employees retirement board may require any disability retirant to undergo a medical examination. If any disability retirant refuses to submit to a medical examination, his retirement allowance shall be discontinued until his withdrawal of the refusal. Should the refusal continue for one year, all his rights in and to such retirement allowance shall be forfeited. Upon completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the retirant is physically and mentally capable of resuming service similar to that from which he was retired. If the board concurs in the report that the disability retirant is capable of resuming service similar to that from which he was retired, the payment of the disability allowance shall be terminated not later than three months after such

determination or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to his last employer before retirement that the retirant is capable of resuming service and the employer shall restore the retirant to his previous position and salary or to a position and salary similar thereto.

The board may adopt rules requiring each disability retirant to file with the board an annual statement of earnings and current medical information on his condition.

If a disability retirant is restored to service by an employer covered by this chapter, his retirement allowance shall cease and the annuity and pension reserves on his allowance at that time in the annuity and pension reserve fund shall be transferred from the annuity and pension reserve fund to the employees' savings fund and the employers' accumulation fund, respectively.

The board may terminate disability retirement at the request of the retirant.

If a disability allowance is terminated for any reason, and the total disability allowance paid is less than the amount of the accumulated contributions of the member transferred to the annuity and pension reserve fund at the time of his disability retirement, the difference shall be transferred from the annuity and pension reserve fund to such other fund as may be required. In determining the amount of a member's account following the termination of disability retirement for any reason, the total allowance paid shall be charged against the member's refundable account.

If a former disability retirant again becomes a contributor to this system, the state teachers retirement system, or the public school employees retirement system, and complete[s] an additional two years of service credit, he shall be entitled to full service credit for the period of disability retirement.

If any employer employs any member who is receiving a disability allowance, the employer shall file notice of employment with the retirement board, designating the date of employment. In case the notice is not filed, the total amount of allowance paid during the period of employment prior to notice shall be charged to the employer and paid from funds supplied by the employer.

Ohio Rev. Code § 145.47

Each public employee who is a member of the public employees retirement system and who is a township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent shall contribute nine and one-half per cent of his earnable salary to the employees' savings fund, and every other public employee who is a member shall contribute eight per cent of his earnable salary to the employees' savings fund except that the public employees retirement board may raise the contribution rate to a rate not greater than ten per cent of the employees' earnable salary. The head of each state department, institution, board, and commission, and the fiscal officer of each local authority subject to Chapter

145. of the Revised Code, shall deduct from the earnable salary of each member on every payroll of such member for each payroll period subsequent to the date such employee became a member, an amount equal to the applicable per cent of such member's earnable salary. The head of each state department and the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall transmit promptly to the secretary of the public employees retirement board a report of member deductions at such intervals and in such form as the board shall require, showing thereon all deductions for the public employees retirement system made from the earnable salary of each member employed together with warrants or checks covering the total of such deductions. A penalty of five per cent of the total amount due for the particular reporting period shall be added when such report together with warrants or checks to cover the total amount due from the earnable salary of all amenable employees of such employer are filed thirty or more days after the last day of such reporting period. Such penalty shall be added to and collected on the next succeeding regular employer billing. Interest at the rate of six per cent shall be charged on the amount of the penalty in case such penalty is not paid within three months after it is added to the regular employer billing. The secretary of the board after making a record of all such receipts shall deposit them with the treasurer of state for use as provided by Chapter 145. of the Revised Code. In addition to the periodical reports of deduction required by this section, the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall submit to the board at least once each year, a complete listing of all

noncontributing appointive employees. Where an employer fails or refuses to deduct contributions for any employee and to transmit such amounts to the retirement system, the retirement board may make a determination of the employees' liability for contributions and certify to the employer the amounts due for collection in the same manner as payments due the employers' accumulation fund, provided that any amounts so collected shall be a penalty against the employer and held in trust pending receipt of contributions from such employees for the period involved as provided by law and, thereafter, the amount in trust shall be transferred to the employers' accumulation fund as a credit of such employer. The fiscal officer shall require each new member to submit to the board a detailed report of all his previous service as a public employee along with such other facts as the board requires for the proper operation of the public employees retirement system. If an employee fails to file the membership record provided in section 145.16 of the Revised Code within thirty days after becoming a contributor, the secretary shall so advise the fiscal officer who shall thereafter withhold all salary payments to such employee until such record is filed with the public employees retirement system.

Any member who, because of his own illness, injury, or other reason which may be approved by his employer is prevented from making his contribution to the system for any payroll period, may pay such deductions as a back payment within one year.

---

29 C.F.R. § 1625.10(a)(1) and (f)(1)(iii) (formerly codified at 29 C.F.R. § 860.120(a)(1) and (f)(1)(iii))

(a)(1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by secton 12(a) of this Act because of the age of such individuals." The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an

exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following section explain three key elements of the exception: (i) What a "bona fide employee benefit plan" is; (ii) what it means to "observe the terms" of such a plan; and (iii) what kind of plan, or plan provision would be considered "a subterfuge to evade the purposes of [the] Act." There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

---

29 C.F.R. 1625.10(f)(1)(iii) (formerly codified at 29 C.F.R. § 860.120(f)(1)(iii))

(iii) *Retirement plans* – (A) *Participation.* No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not

the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

BEST AVAILABLE COPY

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Must employee benefit plans which discriminate on the basis of age be justified by age-related cost considerations to qualify for exemption from the ADEA under § 4(f)(2)?

2. May an employee benefit plan continue to discriminate on the basis of age solely because the plan predates the passage of the ADEA?

3. If employee benefit plans which predate the ADEA are permitted to discriminate, do they lose their exemption when substantial changes are made in the plan at a later date?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. EMPLOYERS WHO DENY DISABILITY BENEFITS SOLELY ON THE BASIS OF AGE MUST SHOW AN AGE-RELATED COST JUSTIFICATION TO QUALIFY FOR THE § 4(f)(2) EXCEPTION TO THE ADEA	8
A. PERS Failed To Meet Its Burden Of Proof Under § 4(f)(2)	8
B. Legislative History Of § 4(f)(2) Of The ADEA And Its Amendments Shows A Clear Congressional Intent That Benefits May Be Reduced Only To The Extent The Reduction Is Justified By Age-Related Cost Considerations	9
1. The Purpose Of The § 4(f)(2) Exception To The ADEA In 1967 Was To Benefit The Older Worker, Not To Provide A Loophole For The Employer To Discriminate	10
2. The Legislative History Of The 1978 Amendment Confirms The Congressional Intent That The § 4(f)(2) Exception Be Limited To Age-Based Cost Justifications	14
C. The PERS Disability Plan Violates EEOC Regulations	18
1. The PERS Disability Plan Is In Clear Violation Of 29 C.F.R. § 860.120(f)(1)(iii)	18
2. The EEOC Regulations Have Guided Employers For Twenty Years And Are Entitled To Great Deference	19
II. THE 1978 AMENDMENTS TO THE ADEA REVERSED THIS COURT'S REASONING AND DECISION IN *McMANN* THAT PRE-EXISTING PLANS WERE NOT A SUBTERFUGE	24

Table of Contents Continued

	Page
A. The Legislative History Of The 1978 Amendments Show A Clear Intent To Reject This Court's Definition Of Subterfuge In *McMann*	24
B. Congress Did Not Intend To "Grandfather" Unlawful Practices In Perpetuity	29
III. REGARDLESS OF THE EFFECT OF THE 1978 AMENDMENTS TO THE ADEA ON *McMANN* THE PERS DISABILITY PLAN IS NOT EXEMPT UNDER § 4(f)(2)	32
A. Depriving Betts Of PERS Disability Benefits Resulted In Her Involuntary Retirement In Violation Of § 4(f)(2)	32
B. The PERS Plan Is Not A Pre-ADEA Plan Because Of Significant Post-Act Modifications	34
CONCLUSION	37

TABLE OF AUTHORITIES

Cases — Page

Betts v. *Hamilton County Bd. of Mental Retardation*, 631 F.Supp. 1198 (S.D. Ohio 1986) 3, 4, 34
Betts v. *Hamilton County Bd. of Mental Retardation*, 848 F.2d 692 (6th Cir. 1988) 4, 7, 9, 28, 34
Brennan v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) 24, 25, 29
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 9
Chevron, USA, Inc. v. *National Resources Defense, Inc.*, 467 U.S. 837 (1984) 19
Cipriano v. *Board of Educ. of City School Dist.*, 785 F.2d 51 (2nd Cir. 1986) 34
Demby v. *Schweiker*, 671 F.2d 507 (D.C. Cir. 1981) 26
EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981) 19
EEOC v. *Baltimore and Ohio R. Co.*, 632 F.2d 1107 (4th Cir. 1980) 34
EEOC v. *Cargill, Inc.*, 855 F.2d 682 (10th Cir. 1988) .. 28, 34
EEOC v. *County of Orange*, 837 F.2d 420 (9th Cir. 1988) 28, 34
EEOC v. *City of Mt. Lebanon*, 842 F2d 1480 (3rd Cir. 1988) 28
EEOC v. *Westinghouse Corp.*, 725 F.2d 211 (3rd Cir. 1983) *cert. denied* 469 U.S. 820 (1984) 33
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 12
General Electric v. *Gilbert*, 429 U.S. 125 (1976) 21, 27
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 19, 21
Karlen v. *City College of Chicago*, 837 F2d 314 (7th Cir. 1988), cert *denied*, No. 87-1831 28
McMann v. *United Airlines*, 542 F.2d 217(4th Cir. 1976) 24
Nat. Ass'n of Greeting Card Pub. v. *U.S. Post. Ser.*, 462 U.S. 810 (1983) 26
Newport News Shipbuilding & Dry Dock v. *EEOC*, 462 U.S. 669 (1983) 27
NLRB v. *Boeing Co.*, 412 U.S. 67 (1973) 19
Phillips, Inc. v. *Walling*, 324 U.S. 490 (1945) 8
Piedmont & Northern R. Co. v. *ICC.*, 286 U.S. 299 (1932) 8
Sikora v. *American Can Co.*, 622 F.2d 1116 (3rd Cir. 1980) 34
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 19

Table of Authorities Continued

Page

Smart v. *Porter Paint Co.*, 630 F.2d 490 (7th Cir. 1980) . 34
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 8, 33
United Air Lines Inc. v. *McMann*, 434 U.S. 192 (1977) ..... *passim*
U.S. v. *Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110 (1978) 15
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) 29
Western Airlines v. *Criswell*, 472 U.S. 400 (1985) 8, 29
Zinger v. *Blanchette*, 549 F.2d 901 (3rd Cir. 1977) 25

STATUTE

29 U.S.C. § 259 22
Age Discrimination in Employment of 1967 (ADEA). *passim*
ADEA § 2(b), 29 U.S.C. § 621(b) 14
ADEA § 4(f)(1)), 29 U.S.C. § 623(f)(1) 29
ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) ..... *passim*
ADEA § 4(g), 29 U.S.C. § 623(g) 30, 31
ADEA § 4(i), 29 U.S.C. § 623(i) 22, 31
ADEA § 7(e), 29 U.S.C. § 626(e) 22
ADEA § 9, 29 U.S.C. § 628 ..... 13, 21
Age Discrimination in Employment Amendment of 1978, Pub.L. 95-256, 92 Stat 189 ..... 15, 30
Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq* 11
29 U.S.C. § 1051 11
42 U.S.C. § 2000e-12 21
Ohio Rev. Code § 145.35 ..... 1, 8
Ohio Rev. Code § 145.36 ..... 1, 35
Ohio Rev. Code § 145.39 ..... 2, 8, 32
Ohio Rev. Code § 145.58 ..... 2, 35

REGULATIONS

29 C.F.R. § 860.120, *presently codified at* 29 C.F.R. § 1625.10 ..... 4, 13, 20, 22
29 C.F.R. § 860.120(a)(1), *presently codified at* 29 C.F.R. § 1625.10(a)(1) 8

Table of Authorities Continued

Page

29 C.F.R. § 860.120(d), *presently codified at* 29 C.F.R. § 1625.10(d) 28

29 C.F.R. § 860.120(f)(1)(iii), *presently codified at* 29 C.F.R. § 1625.10(f)(1)(ii) 6, 18, 21

LEGISLATIVE MATERIALS

H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) *reprinted in EEOC Legislative History* (EEOC Legislative History) 74 30

S. Rep. No. 723, 90th Cong., 1st Sess. (1967), EEOC Legislative History 60 30

H.R. Rep. No. 527, Part 1, 95th Cong. 1st Sess. (1977), EEOC Legislative History 361 25

S. Rep. No. 493, 95th Cong. 1st Sess. (1977), EEOC Legislative History 435 ..... 14, 25

H. R. Conf. Rep. No. 950, 90th Cong. 1st Sess. (1978), EEOC Legislative History 513 ..... 7, 26, 31

Age Discrimination in Employment: Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788, 90th Cong. 1st Sess. 105-106 (Statement of Anthony J. Obadal, U.S. Chamber of Commerce) 11

Hearing to Eliminate Mandatory Retirement: Hearings on H.R. 6576 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong. 2d Sess 36 (1982) (statement of Robert T. Thompson, Chamber of Commerce of the United States) 23

113 Cong. Rec. (1967)

p. 31254 12

p. 31255 ..... 11, 12

123 Cong. Rec. (1977)

p. 34295 ..... 15, 16

124 Cong. Rec. (1978)

p. 7881 27

p. 7886 17

p. 7888 16

p. 8218 ..... 17, 27

p. 8219 17

Table of Authorities Continued

Page

MISCELLANEOUS

AGE DISCRIMINATION IN EMPLOYMENT ACT: A Compliance and Litigation Manual for lawyers and Personnel Practitioners. (Equal Employment Advisory Council ed. 1982) 23

2 K. Davis, *Administrative Law Treatise* § 7.14 (2d ed. 1979) 19

STATEMENT OF THE CASE

A. Disability Benefits Under The Public Employees Retirement System Of Ohio.

This case involves the denial of disability benefits to an otherwise qualified individual by the Public Employees Retirement System ("PERS") solely on the basis of her age. While the plan is open to all individuals under the age of 60 with at least five years of service credit, those individuals, such as June Betts, who apply after their 60th birthday are denied disability benefits.[1] Thus, a worker disabled at age 23 may still be receiving disability benefits at age 65, while a worker disabled at age 65 will receive no disability benefits. The plan discriminates against workers like June Betts who become disabled after age 60.

Workers excluded from the disability plan after age 60 may still be entitled to age and length of service retirement ("service retirement") but they will receive substantially lower benefit payments. The parties agree that when the ADEA was passed in 1967 the calculations for determining service retirement benefits and disability benefits under the PERS plan were similar. [PERS Br. p.5]. However, in 1976, nine years after passage of the ADEA, O.R.C. Section 145.36 was changed to provide that no one receiving disability benefits should receive less than 30% of their Final Average Salary ("FAS"). No such minimum is available under service retirement. Thus, workers like Betts, who are disabled after age 60, are denied the 30% minimum available to workers disabled before age 60. Disability benefits continue to be paid

---

[1] Ohio Revised Code Section 145.35 [a-21] provides:

"Application for disability retirement may be made by a member . . . provided the member has at least five years of total service credit and *has not attained age sixty* . . . ." (emphasis added)

for the lifetime of the employee and, unlike many other plans, do not convert to the lower service retirement rates.

In addition to lower benefits, workers disabled after age 60 are denied two other benefits due to their exclusion from the PERS disability plan:

1. Those with less than 10 years service are denied free medical coverage for life.[2]

2. Each person excluded from the disability plan is denied a five year leave of absence with a guaranteed right to return to his or her former job or its equivalent with his or her former employer. This right is available to all workers receiving disability benefits but not to workers on service retirement.[3]

Membership in PERS is in lieu of participation in the federal Social Security program. Thus, while most private company employees have pensions in addition to social security benefits, most public employees receive only their PERS benefits.

B. June M. Betts.

June Betts ("Betts") became ill at age 61 in 1985. Her employer, Hamilton County Board of Mental Retardation and Developmental Disabilities ("Hamilton County"), informed her that if she did not apply for length of service retirement with PERS, Hamilton County would initiate

---

[2] Ohio Revised Code 145.58 was amended in 1981 to require a new PERS retiree to have 10 years Ohio service credit to qualify for free health care benefits. This amendment did not apply to members receiving disability benefits. The effective date was delayed five years and did not affect appellee.

[3] Ohio Revised Code 145.39.

forced medical leave and she would receive neither pay nor medical benefits. Hamilton County advised Betts that she was not eligible for PERS disability benefits because she was over 60 years of age. Betts was thus forced to apply for service retirement. While PERS describes her retirement as "voluntary," the District Court disagreed, stating that Betts was "presented with a choice of early retirement or nothing."

As a service retiree Betts received only $158.50 per month (13.4% of FAS). Had she not been disqualified because of her age, she would have received disability benefits of $355.02 per month (30% of FAS). Betts was also denied reemployment rights available to disability retirees but not service retirees.

C. The Proceedings Below.

On June 14, 1985, Betts filed a complaint with the United States District Court of the Southern District of Ohio, alleging a violation of the Age Discrimination in Employment Act ("ADEA"), in that she had been denied disability benefits because of her age. The District Court, on March 27, 1986, decided the case on cross-motions for summary judgment. *Betts* v. *Hamilton County Bd. of Mental Retardation*, 631 F.Supp. 1198 (S.D. Ohio 1986) [A-20]. PERS, apparently conceding that the plan would otherwise violate the ADEA, argued that under this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the PERS disability plan was exempt as a "bona fide" employee benefit plan under § 4(f)(2), 29 U.S.C. § 623(f)(2), because early versions of the plan were in existence before passage of the ADEA. Betts argued that § 4(f)(2) did not apply because the PERS disability plan was not based upon age-related cost justifications. Despite having every opportunity, PERS declined to

introduce any evidence of cost or other economic justification for the discriminatory treatment of employees over 60.

The District Court held that PERS was not entitled to the § 4(f)(2) exception because the exclusion from the plan of persons becoming disabled after age 60 was not "based upon age-related cost factors" as set forth in the EEOC regulations 29 C.F.R. § 860.120, which interpreted § 4(f)(2). The District Court also concluded that Betts was involuntarily retired as a result of her exclusion from the disability plan, a further violation of § 4(f)(2). *Betts*, *supra*, 631 F.Supp. at 1205 [A-28-30].

On appeal, Betts, joined by the EEOC as *amicus*, argued that no economic justification existed for providing the younger employee with disability benefits while denying disability benefits to the older employee. The Sixth Circuit affirmed, agreeing with the District Court that the "critical factor" in determining whether PERS was exempt under § 4(f)(2) was whether the age 60 cut-off for applying for disability retirement benefits was "based upon age-related cost factors as set forth in 29 C.F.R. § 860.120." The Court also held that in amending the ADEA in 1978, "Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines* v. *McMann*." *See Betts* v. *Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694-95 (6th Cir. 1988) [A-4-5].

Although this action involves only June Betts, the problem presented is much wider. Two other Ohio retirement and disability plans have provisions identical to the PERS plans. They are the State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS). At the present time, two class actions raising the

same ADEA issues are pending in the Southern District of Ohio against all three Ohio plans. *See EEOC* v. *PERS*, No. C-1-87-216 and *George* v. *State of Ohio*, No. C-1-86-635.

SUMMARY OF ARGUMENT

The PERS disability plan, which permits only those employees who *"have not attained age sixty"* to apply for disability retirement, is discriminatory on its face. PERS claims the disability plan is exempt under § 4(f)(2) of the ADEA which exempts a:

> "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, . . . and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual. . ."

PERS is not entitled to an exception under § 4(f)(2) because it failed to produce any evidence that the denial of disability benefits to Betts was justified by age-related cost considerations. This "equal benefit or equal cost" principle has been a part of the federal regulations since 1969 and has a firm anchor in the 1967 and 1978 legislative history to the ADEA.

The purpose of § 4(f)(2) of the ADEA of 1967 was to permit employers to hire older workers without incurring the higher costs of some benefit plans, such as life insurance, where costs increase with age. The exception was intended to protect older workers in hiring by permitting employers to adjust benefits commensurate with age-related costs. The exception was not intended to provide a loophole for employers to discriminate against older workers.

When Congress amended the ADEA in 1978, it again focused its attention on § 4(f)(2). During the hearings, the floor debate, and in committee reports, Congress repeatedly stated its intent to permit employers to reduce disability benefits only to the extent reductions could be justified by age-related cost increases. As an exception from remedial discrimination legislation, § 4(f)(2) must be narrowly construed in a manner consistent with the purpose of eliminating arbitrary age discrimination.

The ADEA explicitly granted the Department of Labor ("DOL") the power to "establish reasonable exemptions" under the Administrative Procedures Act. The regulations, first issued by the DOL in 1969, required that for a plan to qualify for the § 4(f)(2) exception any reductions in benefits must be justified by age-related cost considerations. In 1978, Congress similarly instructed the DOL to issue regulations in keeping with the 1978 Amendments. The 1979 DOL regulations were more comprehensive and expressly addressed long-term disability plans. They were adopted by the Equal Employment Opportunity Commission (EEOC) in 1981.

The PERS disability plan operates in clear violation of EEOC regulation 29 C.F.R. § 860.120(f)(1)(iii). The regulation, now codified at 29 C.F.R. § 1625.10(f)(1)(ii) [53 F.R. 5973, Feb. 29, 1988], provides that where employees at younger ages are entitled to long-term disability benefits there is no justification for denying benefits altogether to older employees.

PERS argues that its disability plan is exempt solely because it predates the ADEA. In effect, PERS is arguing that in passing the ADEA, Congress intended to perpetuate all age-based benefits discrimination then in effect. This is contrary to the intent of Congress in enacting the ADEA in 1967 and is contrary to the express intent of Congress in passing the 1978 Amendments.

PERS' claim to perpetual exception improperly relied upon this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), which held that a plan in existence when the ADEA was passed could not be a subterfuge to evade the purposes of the Act. *McMann* was rejected by Congress when it passed the 1978 amendment to the ADEA. The Conference Report, approved by both Houses following the *McMann* decision stated:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

H.R.Conf.Rept. No. 95-950, p.8 (1978), U.S.Code Cong. & Admin. News 1978, p.529, *reprinted in EEOC Legislative History of the ADEA of 1967* ("EEOC Legislative History") at 519 (1981). The Sixth Circuit, below, held that in amending the ADEA in 1978, the Congress expressly repudiated *McMann*. The Court also reviewed the law, the regulations and the legislative history and held that the PERS plan is not exempt since it discriminated against older workers without economic justification. *Betts, supra*, 849 F.2d at 694 [A-4].

Regardless of the holding in *McMann*, the PERS plan is not exempt as a pre-existing plan. Substantial and relevant modifications have been made to the plan since 1974. *McMann* held that plans in existence *prior* to passage of the ADEA could not be a subterfuge. The clear implication was that changes to a plan *after* the ADEA could be a subterfuge and the plan would no longer be exempt. The circuit courts are unanimous in agreeing

that substantial and relevant modifications to plans after the passage of the ADEA can be a subterfuge. PERS made significant changes in 1976 and 1981 and is no longer entitled to an exception as a pre-existing plan.

The decision of the Sixth Circuit should be affirmed.

ARGUMENT

I. EMPLOYERS WHO DENY DISABILITY BENEFITS SOLELY ON THE BASIS OF AGE MUST SHOW AN AGE-RELATED COST JUSTIFICATION TO QUALIFY FOR THE § 4(f)(2) EXEMPTION TO THE ADEA.

A. PERS Failed To Meet Its Burden Of Proof Under § 4(f)(2).

Betts was denied both disability retirement benefits and the accompanying right to resume service solely because of her age.[4] In order to escape liability from this *per se* violation of the ADEA, PERS was required to justify its conduct under one of the ADEA's narrow affirmative defenses. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-22 (1985). Acknowledging the age-based exclusion, PERS seeks refuge in the exception for bona fide employee benefit plans set forth in § 4(f)(2) of the ADEA. The burden of proof under § 4(f)(2) rests with the party invoking the defense, *see Western Airlines* v. *Criswell*, 472 U.S. 400, 416 n. 24 (1985), and that burden is substantial since § 4(f)(2) is to be narrowly construed as an exception to remedial social legislation. 29 C.F.R. § 860.120(a)(1); *Piedmont & Northern R. Co.* v. *ICC.*, 286 U.S. 299, 311-312 (1932); *Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Accordingly, PERS must show that the challenged practice plainly and unmistakably meets

[4] Ohio Revised Code § 145.35 (exclusion of persons age 60 and older); Ohio Revised Code § 145.39 (right to resume service at same or similar position and salary).

the terms and spirit of the remedial legislation that the ADEA represents.

In response to Betts' motion for summary judgment, it was PERS' responsibility to come forward with evidence sufficient to demonstrate a triable issue of fact regarding the § 4(f)(2) defense, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). PERS offered no evidence and raised no contested issues of fact in the District Court. "Despite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." *Betts*, *supra*, 848 F.2d at 695. [A-6]. Ignoring contrary EEOC regulations, PERS argued that cost justification was not required by § 4(f)(2) and that its plan was exempt as a matter of law because the plan predated the ADEA.

Betts contends that the legislative history of the ADEA and long standing administrative regulations require that employers justify any reduction in benefit levels for older workers with proof that benefit costs increase with age. These requirements apply to all plans regardless of the date the plans were created. PERS failed to meet its burden of coming forward with evidence of cost justification in its response to Betts' motion for summary judgment. PERS was, therefore, correctly held liable for violating the Act.

B. Legislative History Of § 4(f)(2) Of The ADEA And Its Amendments Shows A Clear Congressional Intent That Benefits May Be Reduced Only To The Extent The Reduction Is Justified By Age-Related Cost Considerations.

The legislative history of the § 4(f)(2) exception shows a clear congressional intent that employee benefits, such as the PERS disability benefits, were to be reduced only to

the extent that such reductions were justified by age-related cost considerations. Without § 4(f)(2), an employer that failed to provide older workers the same employee benefits as younger workers would be in violation of the ADEA even though the cost of benefits for the older employee would be higher. Congress feared that, upon passage of the ADEA, some employers might discriminate in hiring older workers because of these higher costs. Section 4(f)(2) was intended to permit the employer to reduce the older worker's benefits and, thus, equalize the cost of benefits for younger and older workers without violating the ADEA.

PERS argues that the § 4(f)(2) exception, which was introduced to protect the older worker from hiring discrimination, permits employers to save money by providing no disabiiity benefits to the older worker. This would provide an unintended benefit to employers who discriminate against older workers.

1. The Purpose Of The § 4(f)(2) Exemption To The ADEA In 1967 Was To Benefit The Older Worker, Not To Provide A Loophole For The Employer To Discriminate.

The Administration bill to prohibit age discrimination in employment was introduced in the Senate on February 3, 1967. As introduced, Section 4(f)(2) of S.830 had no exception for employee benefit plans but instead exempted only mandatory retirement which was not a subterfuge to evade the purposes of the Act.

During the Senate hearings on age discrimination, March 15-17, 1967, the U.S. Chamber of Commerce testified that if the ADEA were applied to certain employee benefit plans, it might cause employers to discriminate in hiring older employees. Two concerns were mentioned by

this employer association. First, pension plans at the time often required that an employee work twenty years before he was vested in a retirement plan. The combination of long vesting requirements and forced retirement meant that workers hired after age 45 were usually excluded from pension plans. Employers did not want the ADEA to require any change in this arrangement. The second employer concern involved health and life insurance plans where variations in benefits for older workers were necessary "by cost and actuarial considerations."[5] These two concerns were addressed specifically by Congress.

First, Congress decided not to tackle forced retirement and vesting as part of the original ADEA legislation. Those reforms came later. Congress limited the vesting period for private pension plans to five years in 1974.[6] Congress prohibited forced retirement in 1978.

PERS, selectively citing to legislative history, incorrectly argues that the purpose of the § 4(f)(2) exception was to permit hiring of older workers without including them in employee benefit plans. [PERS Br. 35-39]. No such broad exclusion was ever endorsed by Congress in 1967. In fact, as set out above, the only exclusion debated was in response to the employers who wanted to preserve their long term vesting periods and mandatory retirement.[7]

---

[5] *Age Discrimination in Employment: Hearings before the subcommittee on labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong. 1st Sess. 105-106 (Statement of Anthony J. Obadal, U.S. Chamber of Commerce).

[6] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* ERISA does not apply to state run pension and benefit plans. *See* 29 U.S.C. § 1051.

[7] 113 Cong. Rec. 31255 (Nov. 6, 1967), Legislative History 146. (remarks of Senator Yarborough).

The second concern voiced by employers when the ADEA was proposed was the impact of the Act on the cost of benefits. Congress echoed this concern. During the Senate hearings, sponsors of the bill stated that if employers were required to provide identical benefits to newly hired older employees and younger employees, the higher cost of benefits to older workers could cause the Act to promote, rather than reduce, discrimination.

At the time the Senate voted on the Act in 1967, Senator Javits, who introduced the amendment giving § 4(f)(2) its final form, made the following statement by way of introducing discussion of the benefit plan provisions:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers *exactly* the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often *extremely high cost* of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." (emphasis supplied)

113 Cong. Rec. 31,254-31,255 (Nov. 6, 1967), Legislative History 145-146. Senator Javits' statements about § 4(f)(2) are entitled to great weight in defining Congress' intent. *See, e.g. Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (a statement by one of the legislation's sponsors should be accorded substantial weight in interpreting the statute).

Section 4(f)(2) was drafted in general terms specifying only that "employee benefit plans such as pension, retirement and insurance plans" were to be exempt. From this language it was apparent that some, but not all, employee benefit plans were to be exempt. Congress made no

attempt to legislate in detail how § 4(f)(2) was to be applied to the numerous types of employee benefit plans ranging from defined benefit pensions to profit sharing plans, and including such diverse plans as sick leave, disability, insurance, severance pay, and prepaid legal services. Instead, Congress authorized the Department of Labor ("DOL") to issue regulations and establish reasonable exemptions. Section 9 of the Act (29 U.S.C. § 628) authorized the Secretary, in accordance with the Administrative Procedures Act, to:

> "issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such *reasonable exemptions* to and from any or all provisions of this Act as he may find necessary and proper in the public interest." (emphasis added)

It is clear that Congress intended the DOL to interpret and apply § 4(f)(2) exceptions to the multitude of employee benefit plans in existence at the time.

The first DOL interpretations, 29 C.F.R. § 860.120, were issued nearly contemporaneously with passage of the ADEA. [34 F.R. 9709, June 21, 1969]. The cost and benefit section of the regulations provided that an employer was not required to grant older workers identical benefits as younger workers. The section also stated that a plan would be in compliance where either the actual payment made or the cost incurred was the same as for a younger worker (equal benefits or equal cost). The regulation met the concern of Congress by removing the monetary incentive to discriminate in the hiring of older workers. At the same time, the regulations met the purpose of the ADEA "to prohibit arbitrary age discrimination in employment" and "to help employers and workers

find ways of meeting problems arising from the impact of age on employment." Section 2(b), 29 U.S.C. § 621(b).

2. The Legislative History Of The 1978 Amendment Confirms The Congressional Intent That The § 4(f)(2) Exception Be Limited To Age-Based Cost Justifications.

In 1976 and 1977, Congress held hearings on the ADEA to eliminate mandatory retirement, raise the age cap on private employment to 70, and eliminate the age cap entirely for most federal employees. On October 12, 1977, Senator Williams, of the Senate Committee on Human Resources, submitted the committee report to accompany H.R. 5383. The report addressed concerns that raising the upper age cap to 70 and eliminating mandatory retirement might have an adverse effect on the cost of employee benefit plans:

> Concerns were expressed regarding potential increased costs for employee welfare benefit plans such as *disability*, health, life and other forms of insurance for employees. *Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices.* Existing principles of law, including the § 4(f)(2) bona fide employee benefit plan exemption, as modified by these amendments, would be the standard by which these practices will be evaluated. (emphasis added)

S.Rep.No. 95-493, 95th Cong. 1st Sess. 5 (1977), U.S. Code Cong. & Admin. News 508, EEOC Legislative History 438. Congress clearly recognized that employers were adhering to the cost-based principles of the DOL regulations. When a Congress that reenacts a statute voices its approval of an administrative interpretation, Congress is treated as having adopted that interpretation, and courts are bound thereby. *U.S.* v. *Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 134 (1978).

Senator Williams, in reporting to the Senate, reiterated the committee's intention that DOL continue to use its rulemaking powers to interpret and implement the § 4(f)(2) exceptions. 123 Cong. Rec. 34295 (Oct. 19, 1977), EEOC Legislative History 482.

In *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 201, n.7 (1977), this Court noted that legislative observations 10 years after passage of the ADEA are in no sense part of the legislative history of the Act. At the time of that observation, the 1978 amendments had not yet been passed. However, committee reports and statements by sponsors immediately preceding passage of the ADEA Amendments of 1978, Pub. L. 95-256, 92 Stat. 198, are very relevant to an understanding of the 1978 Amendments.

Senator Williams, in introducing H.R. 5383, stated the present intent of the 1978 amendments to § 4(f)(2):

> "The purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or *disability benefit plans*. Of course, there must be some reason *other than age which justifies the unequal benefits.*" (emphasis added)

123 Cong. Rec. 34295 (Oct. 19, 1977), Legislative History 482. Senator Williams added that "Section 4(f)(2) was intended to permit and *will continue* to permit varying coverage of workers in different age groups to reflect those differences so long as they are based on valid assumptions and applied in a nondiscriminatory manner."

(emphasis added) *Ibid.*, at 34295, EEOC Legislative History 482.

Following this Court's decision in *McMann* and just prior to passage of the 1978 Amendments, Congressman Waxman spoke on the need for employers to have actuarial data to support different benefit levels. PERS has quoted several snippets from Congressman Waxman's speech [Brief 43-44] distorting his intent. They are shown below in full context:

> I am hopeful, however, that employers do not terminate capable and healthy older workers from benefit plans solely on the basis of age. In the *absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act.*
>
> While the conference committee did not specifically address the status of health benefits to older workers protected under this act, it is the intent of this Congress to prevent both open and subtle forms of age discrimination. Exceptions should only be applied in the strictest sense and only with full justification and cause. (emphasis added)

124 Cong. Rec. 7888 (Mar. 21, 1978), EEOC Legislative History 535.

Congressman Pepper, chairman of the House Select Committee on Aging and one of the principal authors of H.R. 5383, urged his colleagues to approve the conference report, stating:

> The exception under section 4(f)(2) of the act is just that—an exception—and as such must be viewed in the narrowest sense.
>
> * * *

> For example, employers may offer health and life insurance benefits to older workers that are different from those of other employees. The original reason for this exception was to promote the hiring of older persons. *Passage of this act should not be construed by any employer, or any court, to permit the sudden total and unilateral termination of a capable and healthy worker from a health, insurance or other welfare benefit plan solely on the basis of age and without full economic justification.* (emphasis added)

124 Cong. Rec. 7886 (Mar. 21, 1978), EEOC Legislative History 532.

Senator Javits responded to employers' concerns that the 1978 amendments, which prohibited involuntary retirement and raised the upper age from 65 to 70, might increase costs for employee welfare benefit plans, such as life, health, and disability programs. He noted that "some plans currently reduce coverage for older workers" and emphasized that:

> [T]hese amendments do not change present law regarding these practices.
>
> * * *
>
> The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers.

124 Cong. Rec. 8218, (March 23, 1978) EEOC Legislative History 539. He added that the DOL intended to "promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans." 124 Cong. Rec. 8219, EEOC Legislative History

540. As set out below the agency regulations that have guided employers covered by the Act have always required cost based justifications in order to reduce benefits as a worker grows older.

C. The PERS Disability Plan Violates EEOC Regulations.

1. The PERS Disability Plan Is In Clear Violation of 29 C.F.R. § 860.120(f)(1)(iii).

The PERS disability plan, which totally excludes workers who become disabled after age 60, clearly violates 29 C.F.R. § 860.120(f)(1)(iii)[8] which deals exclusively with long-term disability plans:

> (W)here employees who are disabled at younger ages are entitled to long-term disability benefits, *there is no cost-based justification for denying such benefits altogether,* on the basis of age, to employees who are disabled at older ages. . . . Reduction on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable *only on the basis of age related cost considerations* as set forth elsewhere in this section. (emphasis added)

The regulation permits age-based reductions in the level of benefits under long-term disability plans only where justified by age-related cost considerations. The regulation also provides two additional approaches for reducing benefits where such reductions can be justified by age-related costs. The first method requires continuation of benefits for older workers but permits reduction in the level of benefits. The alternative is to pay full benefits but for a reduced duration. The regulations also provides for other patterns of reduction if supported by cost data.

[8] 29 C.F.R. § 860.120(f)(1)(iii), which was in effect when Betts was denied disability benefits, was first issued by the DOL June 21, 1979 [34 F.R. 9709]. This regulation was redesignated 29 C.F.R. § 1625.10(f)(1)(iii) by the EEOC in 1987 [52 F.R. 23812, June 25, 1987]. In 1988, 29 C.F.R. § 1625.10(f)(1)(iii) was revised to include 1986 changes to the ADEA and was redesignated 29 C.F.R. § 1625.10(f)(1)(ii) [53 F.R. 5973].

The PERS disability plan fails to comply with any of the several methods provided by the regulations. Instead, the PERS plan denies disability benefits *altogether* for those disabled after age 60. This is in clear violation of § 860.120(f)(1)(iii) which specifically prohibits cutting off benefits altogether because of age.

2. The EEOC Regulations Have Guided Employers For Twenty Years And Are Entitled To Great Deference.

Consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference. *NLRB* v. *Boeing Co.*, 412 U.S. 67, 74-75 (1973), *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). "Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1980). Courts give extra authoritative weight to interpretative rules which are made contemporaneously with the enactment of the statute, which have been followed consistently over a long period, or which were outstanding at the time of statutory reenactment. 2 K.Davis, *Administrative Law Treatise* § 7.14 (2d ed. 1979); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). For over 20 years the DOL/EEOC regulations have consistently held that employee benefit plans may reduce benefits to older employees only to the extent

the reductions can be justified by cost considerations and the regulations have survived reenactment of the Act.

The regulations are entitled to deference because they were issued contemporaneously both with the Act and again with its Amendments. They have consistently articulated the "equal benefit or equal cost" principle since first issued in 1969. Shortly after passage of the ADEA, the DOL issued 29 C.F.R. § 860.120 [34 F.R. 9709, June 21, 1969] which interpreted § 4(f)(2). The cost and benefit section, 29 C.F.R. § 861.120(a), provided:

> "Thus, an employer is not required to provide older workers . . . the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance *plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*" (emphasis added)

In 1978, when it amended the ADEA, Congress made it clear that the DOL should issue more comprehensive guidance with respect to § 4(f)(2), particularly because of the increase in number of older workers expected as a result of raising the coverage to age 70 and the prohibition of mandatory retirement.

On September 22, 1978, the DOL published its proposed amendment to § 860.120 and invited public comment [43 F.R. 43264]. After considering numerous written comments as well as testimony at a hearing on the proposed amendment to § 860.120, the DOL revised its original proposal and published its final regulation [44 F.R. 30658, May 25, 1979]. The regulation on long-term disability plans, § 860.120(f)(1)(iii), was consistent with the 1969 regulations in that it prohibited a complete cutoff of benefits because of age and permitted only reductions which could be justified by age-related costs.

The regulations are also entitled to deference because Congress delegated to the DOL the authority to "to issue such rules and regulations as it may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as it may find necessary and proper in the public interest." Pub.L. 90-202, § 9, 81 Stat. 602 (29 U.S.C. § 628). The power granted to the DOL was far more extensive than the authority to issue "procedural rules" which Congress granted to the EEOC under Title VII. 42 U.S.C. § 2000e-12. *General Electric* v. *Gilbert* 429 U.S. 125, 140-146 (1976). Moreover, even regulations issued under the limited authority of Title VII are entitled to great deference when issued contemporaneously with the Act. *Griggs, supra.*

The regulations are further entitled to deference because Congress has amended the ADEA to change the effect of certain of these regulations while leaving untouched the long term disability regulations. In 1982, Congress disagreed with EEOC regulation § 860.120-(f)(1)(ii),[9] pertaining to health care benefits and amended the ADEA "by requiring an employer to offer his employ-

---

[9] § 860.120(f)(1)(ii) was removed following the 1986 amendments to § 4(g), 29 U.S.C. § 623(g). [53 F.R. 5791, Feb. 29, 1988].

ees age 40 or over but under age 70 the same health benefits offered the employer's younger employees." Section 4(i), 29 U.S.C. § 623(i). P.L. 97-248, 1982 U.S. Code Cong. & Ad. News 792-793. In 1986, Congress added § 4(i) Pub.L. 99-509, § 9201 to make it unlawful to reduce pension benefits because of age. The pension benefits amendment was prompted by an announcement by the EEOC that it intended to rescind a subsection in 29 C.F.R. § 860.120 which pertained to pension benefits and to issue a new interpretation. U.S. Code Cong. & Admin. News, Legis. History 4023 (1982). Again, although Congress was well aware of the EEOC regulations relating to disability plans, it made no changes in them.

Finally, the regulations are entitled to great deference because employers have relied upon them, and to a great extent obeyed them, for over twenty years. Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates 29 U.S.C. § 259 of the Portal-to-Portal Act which states that employers are not subject to liability if they acted in reliance on any written administrative regulation, ruling, or interpretation.

During the 1982 Senate hearings, the U.S. Chamber of Commerce, recognizing the importance of the EEOC regulations in providing guidance to industry, went so far as to urge Congress to codify the then current regulations pertaining to "bona fide employee benefit plans" by making them part of the ADEA itself, stating:

> "The legislative history and the DOL I.B. [Interpretive Bulletin] have proven to be exceedingly helpful in easing compliance by business with an aspect of the 1978 amendments which could have been costly and disruptive to employee benefit arrangements. Despite their salutary effect, they do not offer certainty since the I.B. is not incorporated in the ADEA."

Hearing to Eliminate Mandatory Retirement: Hearings on H.R. 6576 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 2nd Sess. 36 (1982) (Statement of Robert T. Thompson, Chamber of Commerce of the United States). Congress did not incorporate the regulations into the Act. Instead, in 1982, the committee again stated that it expected the DOL to establish regulations in keeping with the amendments. U.S.Code Cong. & Admin. News. Legis. History 793 (1982). Even, the Equal Employment Advisory Council ("EEAC"), an employer group which has filed an *Amicus* brief supporting PERS in this case, has advised employers to rely on these regulations:

> "[s]ince the 1978 Amendments to the ADEA extended ADEA protection to age 70, *employers may no longer engage in the common practice of completely cutting off long-term disability benefits* for all disabled employees and long-term coverage for all active employees *at age 65*. However, employers may lawfully reduce long-term disability benefits for older employees who are under 70 when such reductions are *cost justified*." (emphasis added)[10]

In summary, the regulations meet all of the tests for deference. They are consistent with the legislative history, they were issued contemporaneously with the Act and its amendments, and employers have relied upon them for over 20 years.

---

[10] *AGE DISCRIMINATION IN EMPLOYMENT ACT: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* p.339. Published by the Equal Employment Advisory Council (1982).

II. THE 1978 AMENDMENTS TO THE ADEA OVERTURNED THIS COURT'S REASONING AND DECISION IN *McMANN* THAT PRE-EXISTING PLANS WERE NOT A SUBTERFUGE.

PERS argues that its disability plan is beyond the reach of the ADEA solely because the plan was in existence when the ADEA was passed. [PERS Br. pp.16-21]. It relies upon this Court's decision in *McMann*, which held that a conceded "bona fide employee benefit plan" established before passage of the ADEA which permitted involuntary retirement could not be a subterfuge to evade the Act. PERS argues that this Court's definition of "subterfuge" makes its disability plan exempt under § 4(f)(2) even though it would otherwise be in violation of the ADEA. In effect, PERS argues that in passing the ADEA, Congress intended to perpetuate all age-based benefits discrimination then in effect.

A. The Legislative History Of The 1978 Amendments Shows A Clear Intent To Reject This Court's Definition Of Subterfuge In *McMann*.

The legislative history of the 1978 Amendments to the ADEA makes it abundantly clear that Congress not only overturned this Court's decision in *McMann* but rejected its definition of "subterfuge" as well. Congress specifically stated that plan provisions in effect prior to enactment of the ADEA were not exempt by virtue of the fact that the plan predated the Act.

In 1977, when Congress was considering amendments to the ADEA, it was aware of the three mandatory retirement cases with conflicting reasoning and results; *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), *McMann* v. *United Airlines*, 542 F.2d 217 (4th Cir. 1976)

and *Zinger* v. *Blanchette*, 549 F.2d 901 (3rd Cir. 1977).[11] In *Taft Broadcasting*, the Fifth Circuit ruled that a retirement plan "effectuated far in advance of the enactment of the law" could not be a subterfuge for evasion of the Act. 500 F.2d at 215. In contrast the Fourth Circuit, in *McMann*, ruled that forced retirement pursuant to a pre-Act plan would be considered a "subterfuge" to evade the purposes of the Act absent an employer's showing of a legitimate business purpose for the age-based action. 542 F.2d at 220.

The Senate Report, accompanying the bill to amend § 4(f)(2), H.R. 5383, expressly rejected the Fifth Circuit's reasoning in *Taft Broadcasting* that a pre-existing plan could not be a subterfuge stating:

> "The *[Taft]* court found the language of the section unambiguous and refused to consider the legislative history. *It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of the section 4(f)(2) if it was operative before the effective date of the act.* (emphasis added)

S.Rep. No. 95-493, (Comm. on Human Resources) 95th Cong., 1st Sess. 10 (1977), EEOC Legislative History 443.

In 1977, both Houses passed H.R. 5383 to amend § 4(f)(2) to prohibit involuntary retirement and sent the bill to the Conference Committee to resolve differences in other parts of the bill. While the bill was still in the Conference Committee, this Court decided *McMann*, holding that a bona fide retirement plan could not con-

---

[11] H.R. Rep. No. 95-527, Part I, 95th Cong. 1st. Sess. 5 (1977), EEOC Legislative History 365 and S. Rep. 95-493, 95th Cong. 1st Sess. 10 (1977), Legislative History 443.

stitute a subterfuge to evade the Act if the plan predated the Act.

The Conference Committee, in its report to both houses, disagreed with this Court's reasoning in *McMann*. The Conference Report, which was voted on and approved by both Houses, stated that the amendments were intended to overturn *McMann:*

> "In *McMann* v. *United Airlines*, 98 S.Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 ((1976). *The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.*" (emphasis supplied)

H.R. Conf.Rept. No. 95-950, p. 8 (1978), U.S. Code Cong. & Admin. News p.529, EEOC Legislative History 519.

Since the Conference Report represents the final statement agreed to by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent. *Demby* v. *Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). *See also, Nat. Ass'n of Greeting Card Pub.* v. *U.S. Post Ser.*, 462 U.S. 810, 832 n.28 (1983) (conference committee reports are entitled to great weight). Congress, in approving the Conference Committee Report, made it abundantly clear that pre-existing plans were not to be exempt because they predated either the ADEA or the 1978 Amendments.

On the day the House agreed to the conference report, Congressman Hawkins, one of the House Managers, reported to the House:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case *[McMann]*, particularly its conclusion that an *employee benefit plan* which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA." (emphasis added)

124 Cong. Rec. 7881 (Mar. 21, 1978), EEOC Legislative History 528.

The Senate also expressed its disapproval of this Court's decision in *McMann*. *See* remarks of Senator Javits, 124 Cong. Rec. 8218 (Mar. 23, 1978) EEOC Legislative History at 539 ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that case.'") Following debate, the Senate agreed to the conference report on March 23, 1978, and the President signed the bill on April 6, 1978.

PERS' argument [PERS Br. pp.16-23], that Congress intended only to overrule the result in *McMann* as to involuntary retirement, is without merit. In circumstances similar to these, this Court has held invalid both the reasoning and the holding of a decision "overtuned" by Congress. In *Newport News Shipbuilding & Dry Dock* v. *EEOC*, 462 U.S. 669 (1983), the Court construed the Pregnancy Discrimination Act of 1978 which was passed for the express purpose of overturning the decision in *General Electirc Co.* v. *Gilbert*, 429 U.S. 125 (1975). In *Newport News*, the Court rejected the argument that Congress intended only to overrule Gilbert's result and held that "Congress . . . *unambiguously expressed its disapproval of both the holding and the reasoning of the court in the Gilbert Decision*, 462 U.S. at 678 (emphasis added).

Congress' repudiation of the "holding and reasoning" of *McMann* is entitled to the same effect here. As the House and Senate Conference Committee Report recites in no uncertain terms, "[p]lan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

The Sixth Circuit, below, held that Congress, in passing the 1978 Amendments, repudiated this Court's reasoning in *McMann*. *Betts*, *supra*, 842 F.2d at 694 [A-4]. The Ninth and Tenth Circuits have ruled to the contrary. Both circuits admitted that the legislative history of the 1978 Amendments demonstrates congressional intent to overturn *McMann*. They claim that Congress failed to accomplish that result, however, by not specifically drafting a definition of subterfuge that would remove protection for pre-existing plans. *EEOC* v. *County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) and *EEOC* v. *Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988). This argument disregards the fact that the DOL issued a specific definition of subterfuge as applied to employee benefit plans in 1979. 29 C.F.R. § 860.120(d) [44 F.R. 30658, May 25, 1979]. The 1979 DOL definition of subterfuge, 29 C.F.R. § 860.120(d), which is still in effect today at 29 C.F.R. § 1625.10(d), requires that lower benefits for older workers be justified by age-related cost considerations. *See EEOC* v. *City of Lebanon*, 842 F.2d 1480, 1488-90 (3rd Cir. 1988); *Karlen* v. *City College of Chicago;* 837 F.2d 314, 319 (7th Cir. 1988), cert *denied*, No. 87-1831. Relying on the 1978 ADEA amendments, however, the DOL regulations gave no protection to plans in effect prior to passage of the ADEA. Further, Congress, fully aware of the subterfuge regulation, has repeatedly amended the ADEA but has not amended that DOL definition of subterfuge.

This analysis of the two circuits also disregards the fact that when this Court decided *McMann*, both houses had already passed H.R. 5383 with similar wording as to § 4(f)(2) and the bill was in conference committee for resolution of differences in other sections. The conference managers, being limited to the matters in dispute, would have exceeded their authority had they revised § 4(f)(2) to include a definition of subterfuge.

PERS suggests that the legislative history of the 1978 Amendments should be ignored since Congress did not specifically define subterfuge in the text of the 1978 Amendment. [PERS Br. p.22] The PERS position conflicts with the analysis by this Court of a similar problem under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) which establishes a bona fide occupational qualification (BFOQ) defense. *See Western Airlines* v. *Criswell*, 472 U.S. 400 (1985). Section 4(f)(1) of the ADEA had not been amended in the 1978 Amendments. Nonetheless, this Court reviewed the 1978 legislative history and noted that Congress had endorsed an approach to BFOQ issues developed by the Fifth Circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). *Id.* at 415. Those same sources of legislative history relied upon by this Court in *Criswell* establish Betts' position here: that Congress refuted the "reasoning" of the Fifth Circuit in *Taft Broadcasting Co.* and of the Supreme Court in *McMann*, and that it endorsed the decision of the Fourth Circuit in *McMann*, which held that all employee benefit plans, regardless of their temporal origin, must demonstrate a legitimate business purpose to satisfy the "subterfuge" standard of § 4(f)(2).

B Congress Did Not Intend To "Grandfather" Unlawful Practices In Perpetuity

If Congress failed to overturn the reasoning of *McMann*, as PERS argues, then plans existing at the

time Congress outlaws a practice are granted perpetual immunity, and only new employers or employers with new plans are required to obey the law.

This is clearly contrary to the intent of Congress. The 1967 Committee Reports of both houses expressly state: "It is important to note that [§ 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans."[12] *See McMann* 434 U.S. at 219 n. 13 (Marshall, J., dissenting).

When Congress makes a practice illegal but wishes to "grandfather" existing practices, it does so explicitly and with an expiration date. This is precisely what Congress did in 1978 and 1986. In 1978, it provided that bargaining agreements would not be affected by the 1978 amendment to § 4(f)(2) until January 1, 1980 or the expiration date of the agreement, whichever first occurred. Pub.L. 95-256, 92 Stat. 189. Bargaining agreements were likewise "grandfathered" from compliance with the 1986 amendments to § 4(g)(1) (group health plans) until January 1, 1990. Pub.L. 99-592. There is nothing in the remainder of the 1978, 1982, 1984 or 1986 amendments nor in their legislative history to indicate that employee benefit plans in existence at the time of the amendments' effective dates were to be exempt other than as noted above.

As noted above, in 1978, 1982, 1984 and 1986, Congress amended the ADEA to prohibit practices which previously had been legal. In 1978, it amended Section 12; 29 U.S.C. § 631 to prohibit discrimination against employees aged 65-69. Pub.L. 95-256, 92 Stat. 189, 190. In 1982, it

---

[12] H.R. Rep. No. 805, 90th Cong. 1st Sess. p.4 (1967), EEOC Legislative History 74; S. Rep. No. 723, 90th Cong. 1st Sess. p. 4 (1967) EEOC Legislative History 105, U.S. Code Cong. & Admin. News. 1967, p. 2217.

added Section 4(g); 29 U.S.C. 623(g) to provide that employees age 65-69 were to be entitled to the same group health plan coverage as younger employees and in 1984 Section 4(g) was amended to extend the same coverage to spouses of employees age 65-69. Pub.L. 97-248, 96 Stat. 353 and Pub. L. 98-369, 98 Stat. 1063. In 1986, Congress amended the Act to remove the age 70 cap and to prohibit certain discriminatory pension plan practices. Section 4(i), 29 U.S.C. 623(i); § 11, 29 U.S.C. § 631, Pub.L. 99-592, 100 Stat. 3342 and Pub.L. 99-709, 100 Stat. 1973.

If the *McMann* reasoning that pre-existing plans are exempt under § 4(f)(2) has not been overturned, as PERS claims, then not only are pre-1967 employee benefit plans free to discriminate but employee benefit plans existing when the 1978, 1982, 1984, and 1986 amendments were passed are exempt from those changes in the ADEA as well. Companies with pre-existing plans that would be permitted to discriminate would have a competitive edge over companies with newer plans who would have to comply with the ADEA. Furthermore, there would be no incentive to modify or improve their plans since pre-existing plans would then lose their exception.

Congress clearly did not intend such absurd results. In 1978, it stated that "[p]lan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2) by virtue of the fact they antedate the act or these [1978] amendments." H.R. Conf. Rep. No. 950, p. 8 (1978), EEOC Legislative History 519. It is obvious that in enacting subsequent amendments in later years, Congress expected existing plans to conform.

Other employers and benefit plan administrators across the country have been conforming pre-existing plans to these amendments and the EEOC regulations. PERS should be required to do so as well.

III. REGARDLESS OF THE EFFECT OF THE 1978 AMENDMENTS TO THE ADEA ON *McMANN*, THE PERS DISABILITY PLAN IS NOT EXEMPT UNDER § 4(f)(2).

A. Depriving Betts of PERS Disability Benefits Resulted In Her Involuntary Retirement In Violation of § 4(f)(2).

By denying Betts disability retirement benefits because of her age, PERS forced her into involuntary retirement.

Under Ohio law, a person receiving disability benefits is still considered an employee with important reemployment rights. A disability recipient is placed on a leave of absence for five years. The recipient has a guaranteed right to return to his job if he should recover within that period.[13] A person on service retirement has no such guaranteed reemployment rights. Thus, forcing Betts into service retirement instead of granting her access to the disability plan terminated her from employment. On disability, Betts would still be an employee today, on leave of absence status, with mandatory reemployment rights should she recover.

In 1978, Congress amended the ADEA to specifically prohibit involuntary retirement by adding to § 4(f)(2):

> "except that no such employee benefit plan . . . shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual."

Section 2(a) of the ADEA Amendments of 1978, Pub.L. 95-256, 92 Stat. 189, 29 U.S.C. § 623(f)(2). Thus, the

[13] O.R.C. § 145.39 provides: "A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter."

§ 4(f)(2) defense is not available to PERS because the disability plan caused or permitted Betts involuntary retirement.

This Court, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), applied the 1978 amendment and held that by depriving TWA pilots over age 60 of the option of transferring to flight engineer, an option that was available to younger pilots, the TWA seniority system forced involuntary retirement in violation of § 4(f)(2). Likewise, by depriving Betts of participation in the disability plan which included the right to return to her old job, an option that was available to younger employees, the PERS disability plan forced her into retirement in violation of § 4(f)(2). *See also, EEOC* v. *Westinghouse Corp. (Westinghouse I)*, 725 F.2d 211, 223 n.8 (3rd Cir. 1983), *cert. denied* 469 U.S. 820 (1984) (Denial of layoff benefits to employees age 55 or older which resulted in loss of recall rights might constitute involuntary early retirement).

Writing in an *Amicus*, the California State Teachers' Retirement System has cited to legislative history which suggests that the 1978 amendment to the Act was designed only to prevent the forced retirement of able-bodied workers, those who were otherwise able to perform their duties. Congress wanted to make sure that the ADEA did not prevent employers from removing incompetent workers from the job. That is not the issue here. June Betts does not challenge her termination from her status as a full-time employee. Rather, she contests her forced termination from employment status altogether, specifically from the leave of absence status she should have had as a participant in the disability plan. She was fully qualified for a leave of absence under the PERS disability benefits plan which would have given her five years of reemployment rights. She was denied those ben-

efits because of her age, however, and forced to take service retirement. This type of forced retirement is prohibited by § 4(f)(2).

As the District Court below recognized, "plaintiff was presented with a choice of early retirement or nothing (a livelihood or none)" and therefore "plaintiff was forced into retirement because of her age." *Betts*, *supra*, 631 F.Supp. at 1205 [A-30]. The Sixth Circuit agreed, describing the effect of the disability plan as "forcing length of service retirement." *Betts*, *supra*, 848 F.2d at 694 [A-5].

B. The PERS Plan Is Not A Pre-ADEA Plan Because Of Significant Post-Act Modifications.

PERS argues that because its plan was in existence years before the ADEA it is permitted to continue its discriminatory practices, citing this Court's decision in *McMann*. [PERS Br. pp.16-21]. As set out above, that argument is incorrect in light of congressional actions overturning *McMann*. Moreover, that argument has no relevancy to the facts in this case because the Ohio legislature made significant and relevant changes to the PERS disability and retirement plans in 1976 and 1981.

While *McMann* held that a plan in existence *prior* to the passage of the ADEA could not be a subterfuge to evade the purposes of the Act, the clear implication was that significant changes to a plan *after* passage of the ADEA could be a subterfuge. The circuits are unanimous in agreeing that a Pre-ADEA plan that is modified after passage of the ADEA can be a subterfuge if the change is relevant.[14] The Sixth Circuit, below, did not reach this

[14] *See*, *Cipriano* v. *Board of Educ. of City School Dist.*, 785 F.2d 51, 58 (2nd Cir. 1986), *Sikora* v. *American Can Co.*, 622 F.2d 1116, 1124 (3rd Cir. 1980), *EEOC* v. *Baltimore and Ohio R. Co.*, 632 F.2d 1107, 1112 (4th Cir. 1980), *Smart* v. *Porter Paint Co.*, 630 F.2d 490, 495 (7th Cir. 1980), *EEOC* v. *Orange County*, 837 F.2d 420, 423 (9th Cir. 1988), and *EEOC* v. *Cargill*, 855 F2d 682, 686 n.4, (10th Cir. 1988).

issue because it ruled that Congress had overruled *McMann*.

After ADEA became law in 1967, it was amended in 1974 to bring state and local governments under its ambit. Since 1974, PERS has made changes to the plans nearly every year, several of which have significantly disadvantaged employees who become disabled after age 60.

Prior to 1976, the calculations of benefits for disability retirement and service retirement were similar. [PERS Br. p.5]. However, in 1976, the Ohio legislature amended § 145.36 to put a floor under disability benefits so that no one with 5 years service who became disabled would ever receive benefits of less than 30% of their Final Average Salary (FAS).[15] No similar floor was added to service retirement. When Betts became disabled she was denied this 30% minimum solely because she was 61 years old. She received $158.50 per month on service benefits as opposed to the $355.02 per month she would have received on disability benefits.

There can be no doubt that the 1976 change to the PERS disability plan was relevant and significant. It is that very change that causes Betts to be paid nearly $200 per month less than workers with identical service years who became disabled before age 60.

The second modification occurred in 1981 when the service retirement plan was amended to require 10 years of service credit in order for service retires to be eligible for group hospital and medical benefits.[16] This 10 year service credit requirement did not apply to employees

[15] Ohio Revised Code § 145.36 with the 1976 changes is printed in full on A-1 of Appellee's Motion to Affirm.

[16] Ohio Revised Code § 145.58. The effective date of this change was delayed five years and did not adversely affect appellee.

eligible for disability benefits. Thus, the disabled, who are in greatest need of hospital and medical benefits, are denied these indispensable services because of their age if they become disabled after age 60 and have less than 10 years of service credit. The 1981 amendment to O.R.C. § 145.58 coupled with the age disqualification of the disability plan combine to deprive disabled members of hospital and medical benefits solely on the basis of their age.

These two changes following passage of the ADEA, deprive many public employees who become disabled after age 60 of the 30% minimum benefit and of hospital and medical benefits.

If, in fact, the PERS disability plan was exempt because it was in existence when the ADEA was passed in 1967, this exception was lost when PERS made significant changes in 1976 and 1981 which adversely affect benefits for employees who became disabled after age 60.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT F. LAUFMAN
Counsel of Record
Laufman, Rauh & Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

ALPHONSE A. GERHARDSTEIN
Laufman, Rauh & Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100
Attorneys for Appellee

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-389

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR APPELLANT

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Of Counsel:

Attorneys for Appellant

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

TABLE OF AUTHORITIES

Cases	Page
Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982)	8
Batterton v. Francis, 432 U.S. 416 (1977)	7
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974)	8
EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988)	8
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)	8
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	10
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	2
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	5
Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., ___ U.S. ___, 108 S. Ct. 830 (1988)	9
Miller v. Youakim, 440 U.S. 125 (1979)	7
Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983)	9, 10, 11
NLRB v. United Food & Commercial Workers Union, ___ U.S. ___, 108 S. Ct. 413 (1987)	2
Pittston Coal Group v. Sebben, ___ U.S. ___, 109 S. Ct. 414 (1988)	7
Regan v. Wald, 468 U.S. 222 (1984)	7

	Page
United Airlines, Inc. v. McMann, 434 U.S. 192 (1977)	9, 10
Western Airlines v. Criswell, 472 U.S. 400 (1985)	10, 11

Statutes

	Page
29 U.S.C. § 623(f)(2)	*passim*
29 U.S.C. § 623(g)	9
29 U.S.C. § 623(i)	9

Regulations

29 C.F.R. § 860.120 (January 9, 1969)	3
29 C.F.R. § 860.120 (June 21, 1969)	4
29 C.F.R. § 860.120 (1979)	5

CASE NO. 88-389

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

REPLY BRIEF FOR APPELLANT

In its opening brief, appellant Public Employees Retirement System of Ohio ("PERS") demonstrated that its retirement plan, which limits eligibility to apply for disability retirement benefits to persons under the age of sixty who are not receiving another retirement benefit from the State of Ohio, is exempt from the proscriptions of the Age Discrimination in Employment Act ("ADEA" or "Act") by virtue of Section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) ("Section 4(f)(2)"). PERS explained that the plain, unambiguous language of Section 4(f)(2) protects all ongoing administrative programs for the provision of non-wage compensation that were not conceived specifically to discriminate on the basis of age in regard to those terms and conditions of employment and types of compensation not conferred through employee benefit plans. PERS then demonstrated that its plan is entitled to the coverage of Section 4(f)(2) because it is ongoing; it provides retirement, not wage-based, benefits; and any age-based variations in those retirement benefits are designed to ensure that the largest possible number of persons receive retirement benefits. PERS demonstrated further that its retirement plan is not designed to force any person from the work force, or to vary any person's wages or terms and

conditions of employment.

The briefs submitted by appellee ("Betts") and the Equal Employment Opportunity Commission ("EEOC") are noteworthy for the lack of attention devoted to the plain, unambiguous language of Section 4(f)(2). Ignored is the fact that Section 4(f)(2) extends its protection to "any" bona fide employee benefit plan, which indicates that Congress intended the exemption's coverage to be comprehensive. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (the term "any" is an example of expansive, not limiting, language). Similarly ignored is the fact that the phrase "employee benefit plan" has a well-established meaning in both the law and industrial relations practice, a meaning that is irreconcilable with the age-related cost justification standard promoted by Betts and the EEOC. Indeed, it is revealing that even the lower courts that have subscribed to the conclusion advanced by Betts and the EEOC have been unable to agree on the language in Section 4(f)(2) that provides the statutory rationale for the age-related cost justification.

Because a straightforward reading of Section 4(f)(2) is inconsistent with their age-related cost justification theory, Betts and the EEOC urge the Court to endorse what they characterize as a "contemporaneous and consistent" administrative interpretation of the exemption. *See NLRB v. United Food & Commercial Workers Union*, ___ U.S. ___, 108 S. Ct. 413, 421 n. 20 (1987) (consistency of agency regulation and "whether interpretation is contemporaneous with enactment of . . . statute" are important considerations in evaluating weight to be afforded agency interpretation). A brief review of the evolution of the regulations referring to Section 4(f)(2) reveals, however, that the administrative interpretation is anything but contemporaneous or consistent.

The first regulations concerning the scope of Section 4(f)(2) were promulgated by the Department of Labor ("DOL") on

January 9, 1969,[1] *see* 34 Fed. Reg. 322-23 (1969), more than a year after the passage of the ADEA. 29 C.F.R. § 860.120 stated:

> Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *". Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

While this regulation offered a "safe-harbor" to those employers who could demonstrate that distinctions in benefits provided to older and younger workers were based on age-related cost considerations, it cannot be construed to permit *only* those benefit variances justified by age-related

---

[1] Regulations pertaining to the ADEA initially were published on June 21, 1968. They did not, however, make any reference to Section 4(f)(2). *See* 33 Fed. Reg. 9172-73 (1968).

cost data.

Neither Betts nor the EEOC point to this regulation as having established an age-related cost justification limitation. Instead, they rely on regulations issued on June 21, 1969, as the basis for their claim that the administrative agencies charged with enforcing the ADEA consistently have interpreted Section 4(f)(2) as allowing only those benefit variances justified by age-related cost considerations. *See* 34 Fed. Reg. 9708-09 (1969). These regulations, however, simply added another "safe-harbor":

> Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

To be sure, the following paragraph, entitled "Profit-sharing plans," purported to limit the application of Section 4(f)(2):

> Not all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision and a profit-sharing plan as such would not appear to be within its terms.

But, the following passage makes it clear that this limitation was not designed to constrict the boundaries of the Section 4(f)(2) exemption:

> However, *where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.*

(Emphasis added.) In short, in 1969, DOL regulations acknowledged that Section 4(f)(2) could apply to plans that predicated age-based distinctions in benefits on factors other

than age-related cost considerations.

It was not until 1979 that the age-related cost considerations mentioned in § 860.120 graduated from a safe harbor to the exclusive means for satisfying the terms of Section 4(f)(2). In 1979, DOL promulgated detailed regulations to implement the 1978 amendments to the ADEA, including the Act's new prohibition in Section 4(f)(2) on involuntary retirement. These new regulations provided the opportunity for DOL to state, for the first time, that any benefit variance without age-related cost justification would be characterized as a "subterfuge." *See* 44 Fed. Reg. 30,648, 30,658 (1979). The argument offered by Betts and the EEOC that DOL took this position contemporaneously with the enactment of the ADEA is inconsistent with this regulatory history.

Even if the various versions of 29 C.F.R. § 860.120 reflect the consistency that Betts and the EEOC attribute to them, the age-related cost considerations limitation must be rejected because it is at odds with congressional intent. *See United Food & Commercial Workers Union*, 108 S. Ct. at 421 (agency interpretation must be consistent with legislative intent); *accord, INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-50 (1987). As explained in PERS' opening brief, at 25-29, the language of Section 4(f)(2) indicates that Congress intended to exempt from the ADEA any plan that provides employees with benefits unrelated to salary or wages, so long as the plan is not designed to frustrate the employment of older workers.[2] Further, the legislative history confirms that

---

[2] The age-related cost justification cannot be derived from the "such as retirement, pension, or insurance plan" language of the statute. For example, age-related cost is not the "common thread" connecting those types of plans. Profit-sharing retirement plans, retirement incentive plans, and defined-contribution retirement plans vary benefits in ways that frequently, if not always, are without age-related cost justifications. The age-related cost justification theory also cannot be derived from the "subterfuge" language of the exemption. A subterfuge refers to a specific intent to evade a statutory requirement, which requires a subjective inquiry. In contrast, the age-related cost justification theory depends exclusively on a particular kind of empirical proof, which requires an objective inquiry that is not statutorily mandated.

Congress, for a variety of reasons, elected to promulgate a broad exemption from the ADEA for employee benefit plans, with the understanding that the problems of age discrimination in employee benefit plans would be addressed comprehensively in subsequent legislation. *See* discussion in PERS' opening brief, at 30-39. The age-related cost considerations theory simply is irreconcilable with the legislative compromise embodied in the language and legislative history of Section 4(f)(2).

It is true that the 1967 legislative history of Section 4(f)(2) indicates that some proponents of the exemption were concerned with age-related cost considerations. As Betts and the EEOC now apparently are willing to concede, however, even one of Section 4(f)(2)'s principal sponsors, Senator Javits, envisioned that Section 4(f)(2) would do more than just protect benefit plans that differentiated on the basis of age when justified by age-related cost considerations.[3] *See* EEOC's brief, at 18 and n. 11. (Senator Javits was concerned with preventing the disruption of existing benefit plan requirements). *See also* Betts' brief, at 9-10. But, as the Court has noted,

> even if these were the only available indications of congressional intent apart from the language which Congress enacted, we would have grave doubts that they were sufficient to overcome what seems to us to be the clear, generic meaning of . . . word[s]. . . . Oral testimony of witnesses and individual Congressmen, unless very precisely

[3] Contrary to the EEOC's assertion, *see* EEOC's brief at, 16, 18-19 n. 11, nothing in the 1967 legislative history indicates that Senator Javits aligned himself with Senator Smathers, or that he sought to accommodate Senator Smathers' perspective in his amended version of Section 4(f)(2). Indeed, Senator Javits announced his intention to offer an amendment to Section 4(f)(2) *before* Senator Smathers suggested that age-related costs be incorporated into the ADEA. *See Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 27, 28 (March 14, 1967).

> directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President.

Regan v. Wald, 468 U.S. 222, 237 (1984). *See also Pittston Coal Group v. Sebben*, ____ U.S. ____, 109 S. Ct. 414, 420-21 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history, and the text of the present statute plainly embraces criteria of more general application.").[4]

Two other factors militate against deferring to the DOL/EEOC interpretation of Section 4(f)(2). First, DOL did not participate in drafting the version of Section 4(f)(2) enacted by Congress. *Cf. Miller v. Youakim*, 440 U.S. 125, 144 (1979) (agency interpretation assumes additional significance when agency's suggestions are incorporated in legislation). As noted in PERS' opening brief, at 30-39, the version of Section 4(f)(2) offered by the Secretary of Labor was considered too restrictive by Congress.

Second, the administrative regulations in question are "interpretative," not substantive. Consequently, courts need not "give effect" to them. *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977). In fact, the Fifth Circuit twice has applied Section 4(f)(2) to employee benefit plans that denied benefits

[4] Betts and the EEOC further err in their reliance on 1978 legislative history to the ADEA for the purpose of explaining the scope of Section 4(f)(2) as originally enacted in 1967. "Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct post enactment polls of the original legislators." *Pittston Coal*, 109 S. Ct. at 422.

to older workers despite the fact that those plans did not reflect age-related cost considerations. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215-17 (5th Cir. 1974) (profit-sharing retirement plan); *Alford v. City of Lubbock*, 664 F.2d 1263, 1265 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan). In addition, other circuits have refused to apply the age-related cost considerations theory to employee benefit plans that predate the passage of the ADEA. *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. Cargill, Inc.*, 855 F.2d 682 (10th Cir. 1988).

Principal among the EEOC's arguments in favor of deferring to its interpretation of Section 4(f)(2) is the contention that PERS' interpretation will open a "Pandora's box" of age discrimination infecting every aspect of employment. The EEOC's claim is nothing more than hyperbole. Rejection of the age-related cost limitation will not authorize employers to discriminate on the basis of age in any term or condition of employment or in compensation not conferred through an employee benefit plan. Moreover, discrimination intended to circumvent the purpose of the ADEA - enhancing the employment opportunities of older workers - will, as is the case now, not be countenanced.

Rejection of the age-related cost limitation *will*, however, give effect to the language of Section 4(f)(2). It will also permit Section 4(f)(2) to serve its purpose of preventing the disruption of myriad public[5] and private[6] employee benefit plans, plans

[5] As noted in the brief amicus curiae submitted on behalf of PERS by the Commonwealth of Pennsylvania and several other states, "at least ten states [in addition to Ohio] restrict disability retirement benefits to those" persons who become disabled prior to eligibility for age and service retirement. *See* Pennsylvania's brief, at 29-30. "Twenty-five states include other express age-related distinctions in establishing eligibility requirements for disability retirement benefits." *See id.*, at 30-31.

[6] According to the brief amicus curiae submitted on behalf of PERS by the Association of Private Pension and Welfare Plans ("APPWP"), "the majority of retirement plans . . . apparently limit eligibility for disability benefits to those (younger) employees who are ineligible for regular or early retirement benefits." *See* APPWP's brief, at 24. (Citation omitted.)

that were created in good faith and that cannot satisfy the arbitrary age-related cost considerations requirement that the Sixth Circuit and the EEOC seek to impose. Tha. avoidance of such disruption might generate effects that are unattractive to the EEOC is a problem that must be directed to the attention of Congress, not to this Court. *See Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, ___ U.S. ___, 108 S. Ct. 830, 837 (1988) (policy arguments should be addressed to Congress).[7]

Both Betts and the EEOC recognize that even if this Court adopts the "age-related cost considerations" theory, reversal still would be required unless (1) the interpretation of the "subterfuge" clause, as discussed in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), is repudiated, or (2) PERS is not found to be a preexisting plan. *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988). PERS discussed at length in its original brief why *McMann* is still good law in respect to its conclusion that employee benefit plans that predate the passage of the ADEA in 1967 are exempt from the coverage of the Act.[8] *See* PERS' opening brief, at 16-23. Betts and the EEOC argue, however, that comments in the legislative history of the 1978 amendments to Section 4(f)(2) are enough to overrule the Court's reasoning in *McMann*, as well as the holding in that case. Betts places heavy reliance on two of the Court's decisions, *Newport News*

[7] Since 1967, Congress has not hesitated to amend the ADEA to address particular problems of age discrimination in employee benefit plans. For example, in 1978, the prohibition against involuntary retirement was added. In 1982, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and older as are offered to employees under age 65. 29 U.S.C. § 623(g). Finally, in 1986, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. §623(i).

[8] Even if a preexisting plan can be a subterfuge, there "is no support in the legislative history for the interpretation of that language as requiring 'some economic or business purpose.'" *McMann*, 434 U.S. at 207 (White, J., concurring). (Citation omitted.)

Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983), and *Western Airlines v. Criswell*, 472 U.S. 400 (1985). Neither of these cases, however, lends support to the proposition that legislative history, in the absence of corrective legislation, is enough to supplant a standing judicial interpretation of law.

In *Newport News*, the Court was called on to interpret the Pregnancy Discrimination Act of 1978, which amended Title VII of the Civil Rights Act of 1964. The Pregnancy Discrimination Act was Congress' response to the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which this Court determined that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U.S. at 125.

Examining the *language* of the Pregnancy Discrimination Act, the Court concluded that

> [w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision. . . . *The first clause of the [Pregnancy Discrimination] Act states, quite simply:* "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical condition."

Newport News, 462 U.S. at 678. (Emphasis added.) The Court reiterated its reliance on the language of the amending legislation in a subsequent portion of its decision: "*[t]he 1978 Act makes clear* that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." 462 U.S. at 684. (Emphasis added.) Although the Court found in the legislative history additional support for its position, it acknowledged Congress' recognition "that *amending legislation was necessary* to reestablish the principles of Title VII law as they had been understood prior

to the *Gilbert* decision." *Id.* at 679.[9] (Emphasis added.)

The decision in *Criswell* also is of no assistance to Betts. In *Criswell*, congressional inaction was relied on by the Court as one of several reasons for adopting a longstanding lower court interpretation of legislation. That is far different than relying exclusively on legislative history to *overturn* a standing Supreme Court interpretation of a statute. If Betts is correct that the legislative history of a Congress convened ten years after passage of legislation is sufficient to overrule judicial interpretations of that legislation, then it necessarily follows that Congress was not required in 1978 to add to Section 4(f)(2) the language prohibiting involuntary retirement. All of *McMann*, including its holding, could have been swept away simply by amending Section 4(f)(2) in some insignificant fashion, such as substituting the word "chapter" for "Act" in the subterfuge clause of Section 4(f)(2), provided, of course, that disparaging comments about the *McMann* decision were made during the course of congressional debate over the amendment. This clearly is not the law.

Betts and the EEOC next argue that this Court can avoid disturbing *McMann* because PERS' status as a preexisting plan was forfeited when it was amended in 1976 to provide a minimum benefit for disability retirants, but not for age and service retirants. *See* EEOC's brief, at 25-26 and note 16. This argument ignores the fact that the provision challenged by Betts and struck down by the Sixth Circuit - the prohibition against persons age sixty or older applying for disability retirement benefits - was instituted in 1933.[10] The 1976 amendment of PERS did *not* discriminate between

---

[9] The circumstances of *Newport News* offer another crucial distinction in comparison to the case at bar: the legislative history scrutinized by the Court in *Newport News* was created by the Congress that *enacted* the Pregnancy Discrimination Act; the Court did not rely on the legislative history of one Congress to explain the meaning of a statute enacted ten years earlier by a different Congress.

[10] The age 60 requirement was not contained in the version of Ohio law in effect from 1957-1959.

older and younger workers. Rather, it differentiated between the disabled and non-disabled. Thus, the 1976 amendment to PERS did not affect PERS' status as a preexisting plan.

Even if PERS' plan is not a preexisting plan, PERS still has carried its burden of demonstrating that its plan is entitled to the coverage of Section 4(f)(2): PERS is bona fide, i.e., it exists and pays substantial benefits; it is, by definition, an "employee benefit plan such as a retirement, pension, or insurance plan;" and it is not a "subterfuge to evade the purposes of the Act" - disability retirement benefits are not designed to frustrate the employment of older workers, but instead exist to provide benefits to persons who, at the time they become disabled, would otherwise be ineligible for age and service retirement. Finally, PERS has no authority to permit or require the involuntary retirement of any individual because of age.[11]

For the foregoing reasons and those set forth in PERS' opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings not inconsistent with this Court's opinion.

---

[11] As both PERS, *see* PERS' opening brief, at 10 n. 9, and the EEOC, *see* EEOC's brief, at 3 n. 3, have noted, the Sixth Circuit did not address the district court's conclusion that Betts' ineligibility for disability retirement benefits resulted in her involuntary retirement. The Sixth Circuit should be directed to address this conclusion on remand. The district court's conclusion is, in any event, absurd. Betts was *attempting* to retire. The only source of contention between the parties was the type of benefits for which she could apply. The fact that she was ineligible for one type of retirement benefit because of her age can in no way detract from the facts that Betts' retirement was motivated by her health and that PERS had no statutory authority, and did not attempt, to involuntarily retire her because of her age.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Attorneys for Appellant

Of Counsel:

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

February, 1989

Title 29 - LABOR

Chapter V - Wage and Hour Division,
Department of Labor

SUBCHAPTER C - AGE DISCRIMINATION IN EMPLOYMENT

PART 860 - INTERPRETATIONS

Miscellaneous Amendments

(34 Fed. Reg. 322-23 (January 9, 1969))

Pursuant to the Age Discrimination in Employment Act of 1967 (81 Stat. 602; 29 U.S.C. 620) and Secretary's Orders No. 10-68 (33 F.R. 9729) and No. 11-68 (33 F.R. 9690), 29 CFR Part 860 is hereby amended by revising § 860.110, and by adding new §§ 860.20, 860.75, 860.104, 860.106, and 860.120 to read as set forth below.

* * *

6. The new § 860.120 reads as follows:

§ 860.120 Costs and benefits under employee benefit plans.

Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *". Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan

will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

* * *

Title 29 - LABOR

Chapter V - Wage and Hour Division, Department of Labor

SUBCHAPTER C - AGE DISCRIMINATION IN EMPLOYMENT

PART 860 - INTERPRETATIONS

Miscellaneous Amendments

(34 Fed. Reg. 9708-09 (June 21, 1969))

Pursuant to the Age Discrimination in Employment Act of 1967 (81 Stat. 602; 29 U.S.C. 620) and Secretary's Orders No. 10-68 (33 F.R. 9729) and No. 11-68 (33 F.R. 9690), 29 CFR Part 860 is amended as set forth below.

As these are interpretive rules and are not substantive, the provisions of 5 U.S.C. 553 concerning notice of proposed rule making, public participation therein, and delay in effective date do not apply. I do not believe such procedure and delay will serve a useful purpose here. Accordingly, these rules shall be effective immediately.

* * *

6. Section 860.120 is revised to read as follows:

§ 860.120 Costs and benefits under employee benefit plans.

(a) Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization

"to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

(b) Profit-sharing plans: Not all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision and a profit-sharing plan as such would not appear to be within its terms. However, where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.

* * *

88-389

No. 88-389

Supreme Court, U.S.
FILED
DEC 14 1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLANT

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. ECONOMIC JUSTIFICATION IS NOT THE SOLE METHOD OF ESTABLISHING THAT AN EMPLOYEE BENEFIT PLAN IS "BONA FIDE" WITHIN THE MEANING OF SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT	7
A. The § 4(f)(2) Defense Is Available To All Bona Fide Employee Benefit Plans	7
B. The Language And Legislative History Of § 4(f)(2) Do Not Support A Restrictive Reading Of The Exception	9
II. A BONA FIDE EMPLOYEE BENEFIT PLAN IS PROTECTED BY SECTION 4(f)(2) UNLESS IT IS A SUBTERFUGE TO EVADE THE ADEA	12
A. This Court's Previous Ruling That An Employee Benefit Plan Which Predates The ADEA Need Not Show Cost Or Other Business Justification To Qualify For The § 4(f)(2) Exclusion Was Not Disturbed By The 1978 ADEA Amendment	13
B. A Plan Which Is Justified By Age-Related Cost Factors Cannot Be A Subterfuge	15

TABLE OF CONTENTS—Continued

	Page
III. ONCE AN EMPLOYER HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY BUSINESS REASON FOR MAINTAINING AN EMPLOYEE BENEFIT PLAN PROVIDING LESSER OR NO BENEFITS TO OLDER EMPLOYEES, THE PLAINTIFF HAS THE BURDEN TO PROVE THAT THE PLAN IS A SUBTERFUGE TO EVADE THE PURPOSES OF THE ADEA	19
A. A Plaintiff's Prima Facie Case May Be Rebutted With Legitimate Reasons For The Employer's Conduct. The Plaintiff Must Then Prove Pretext	19
B. This Burden Of Proof Scheme Applies To The ADEA, With The Burden Remaining On The Plaintiff To Prove That The Employer's Legitimate Reasons Were In Fact A Subterfuge	21
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Ackerman v. Diamond Shamrock Corporation, 670 F.2d 66 (6th Cir. 1982)	20
Alford v. City of Lubbock, Texas, 664 F.2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982)	5
Betts v. Hamilton County Board of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986)	4, 5
Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692 (6th Cir. 1988)	5
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam)	3, 25
Braunstein v. Commissioner of Internal Revenue, 374 U.S. 65 (1963)	10
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974)	9, 10, 11
Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981)	22, 23
Cipriano v. Board of Education of City School District, 785 F.2d 51 (2d Cir. 1986)	9, 13, 18, 19, 26
Crosland v. Charlotte Eye, Ear And Throat Hospital, 686 F.2d 208 (4th Cir. 1982)	5, 7, 17, 24, 25
Dale v. Chicago Tribune Company, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987)	22
Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981)	20
EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir. 1984)	8
EEOC v. Cargill, 855 F.2d 682 (10th Cir. 1988)	5, 15
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)	5, 14, 15
EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982)	19, 26
EEOC v. State of Maine, 644 F.Supp. 223 (D. Me.), *aff'd mem.* 823 F.2d 542 (1st Cir. 1987)	5, 14, 15
EEOC v. Westinghouse, No. 86-1226 (3d Cir. November 30, 1988)	19
EEOC v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984)	3, 8

TABLE OF AUTHORITIES—Continued

	Page
Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978)	3, 21
Harbison-Walker Refractories v. Brieck, No. 87-271 (decision pending)	3
International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company, 585 F.Supp. 261 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985)	5, 15
Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (5th Cir. 1980)	8
Johnson v. Transportation Agency, Santa Clara County, California, 107 S.Ct. 1442 (1987)	21
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	22
Lorillard v. Pons, 434 U.S. 575 (1978)	3
McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973)	*passim*
McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677 (1988)	3
Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984)	19
Potenze v. New York Shipping Association, Inc., 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987)	18, 19
Shell Oil Co. v. Dartt, 434 U.S. 99 (1977)	3
Sierra Club v. Secretary of Army, 820 F.2d 513 (1st Cir. 1987)	14
Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980)	8, 19
Smith v. Farah Manufacturing Co., Inc., 650 F.2d 64 (5th Cir. 1981)	22
Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983)	22
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	*passim*
Thompson v. Chrysler Corporation, 569 F.2d 989 (6th Cir. 1978)	23
Trans World Airlines v. Thurston, 469 U.S. 111 (1985)	3
United Air Lines v. McMann, 434 U.S. 192 (1977)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)	3
Wards Cove Packing Company, Inc. v. Atonio, No. 87-1387, *cert. granted*, 56 U.S.L.W. 3894 (June 28, 1988)	3
Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988)	3, 20
Statutes	
Age Discrimination in Employment Act (1967), 29 U.S.C. § 621 *et seq.*	2, 7
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	22
Section 4(f)(2), 29 U.S.C. § 623(f)(2)	*passim*
Section 4(f)(3), 29 U.S.C. § 623(f)(3)	22
29 U.S.C. § 623(a)(1)	7
Pub.L. 90-202, 81 Stat. 602 (1967)	13
Pub.L. No. 95-256, § 2(a), 92 Stat. 189 (1978)	14
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*	8
29 U.S.C. § 1002(1) (1988)	8
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	2, 3
Ohio Rev. Code § 145.35 (1933)	4, 5
Rules and Regulations	
Department of Labor's 1969 Interpretative Bulletin, 34 Fed. Reg. 9709 (1969), codified at 29 C.F.R. § 860.120 (1969)	12, 18
44 Fed. Reg. 37974, republished as 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25, 1987)	18
Congressional History	
Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 24-30 (1967)	11, 16
H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213	11, 16

TABLE OF AUTHORITIES—Continued

	Page
113 Cong. Rec. 31255 (1967)	16, 17
113 Cong. Rec. 34,738-754 (1967)	11, 16
124 Cong. Rec. S4450 (1978)	12, 18
Miscellaneous	
1 Sutherland on Statutory Construction, § 22.33 (4th ed. 1985)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-369

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLANT

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Appellant. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-

ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Many of these plans are products of collective bargaining with employee representatives. As potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which these benefit plans may be attacked as discriminatory notwithstanding the exception for bona fide benefit plans set forth in § 4(f)(2) of the ADEA.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency which EEAC represents. The court below held that the only way an employee benefit plan can qualify for the § 4(f)(2) defense is if the employer proves it is based on age-related cost factors. This conclusion unduly restricts the broad language of the exclusion, which authorizes action taken pursuant to a bona fide employee benefit plan as long as the plan is not a subterfuge to evade the ADEA. Further, by placing the full burden of proving lack of discriminatory motive on the defendant, the decision below

conflicts with this court's holding in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), reaffirmed in *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2784 (1988), that the ultimate burden of persuasion is always with the plaintiff. *See also Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam) (inappropriate to require defendant employer to prove "absence of discriminatory motive").

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 240 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving § 4(f)(2) of the ADEA, including *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Harbison-Walker Refractories v. Brieck*, No. 87-271 (decision pending); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). *See also McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA). In addition, ADEA has filed briefs in a number of cases addressing the burden of proof under Title VII of the Civil Rights Act of 1964, including *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988); *Wards Cove Packing Company, Inc. v. Atonio*, No. 87-1387, *cert. granted*, 56 U.S.L.W. 3894 (June 28, 1988).

STATEMENT OF THE CASE

The facts set forth herein are taken from the district court's decision below. *Betts v. Hamilton County Board of Mental Retardation*, 631 F.Supp. 1198, 1201 (S.D. Ohio, 1986). Appellant, the Public Employees Retirement System of Ohio ("PERS"), provides retirement benefits to most of Ohio's public employees. In 1984, appellee June Betts had been employed as a speech pathologist by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("County Board") for approximately five years when she voluntarily transferred to another position because of poor performance. 631 F.Supp. at 1201. By September 1984, Betts had failed to perform satisfactorily in her new job and accepted an even lower-paying position as a Teachers' Aid. *Id.* It appears that Betts' poor performance was due to medical reasons, and in May 1985, when she could not perform her duties as a Teachers' Aid, Betts was told that she could voluntarily retire or be placed on unpaid medical leave. *Id.* Betts was sixty-one years old. *Id.*

Under the terms of Ohio's public pension law, Betts was ineligible for disability retirement benefits. Ohio's statute provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and *has not attained age sixty* and is not receiving disability benefits under any other Ohio state or municipal retirement program.

Ohio Rev. Code § 145.35 (1933) (emphasis supplied). Accordingly, PERS denied Betts' application for disability retirement. 631 F.Supp. at 1201.

Betts filed an age discrimination charge with the EEOC against PERS and the County Board. The district

court granted Betts' motion for summary judgment and denied PERS' cross-motion for summary judgment. The court concluded that Ohio Rev. Code § 145.35 violated the ADEA by denying benefits to employees over sixty, and "assume[d] that the plan was purposefully drafted to have that effect." 631 F.Supp. at 1202. Moreover, the court found that the PERS plan was not exempted by § 4(f)(2) of the ADEA for a number of reasons, one being that the plan was not justified by significant cost considerations.

The U.S. Court of Appeals for the Sixth Circuit affirmed. 848 F.2d 692 (6th Cir. 1988). Holding that this Court's decision in *United Air Lines v. McMann*, 434 U.S. 192 (1977), had been "expressly repudiated" when Congress amended the ADEA to prohibit mandatory retirement, *id.* at 694, the Sixth Circuit required the employer to prove that there was cost or other economic justification to support the denial of disability benefits to employees over sixty. *Id.* at 695. As Judge Wellford pointed out in his dissenting opinion, several other circuits have held to the contrary. *Betts v. Hamilton County Board of Mental Retardation*, 848 F.2d 692, 697-98 (6th Cir. 1988) (Wellford, J., dissenting). *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. Cargill*, 855 F.2d 682 (10th Cir. 1988); *EEOC v. State of Maine*, 644 F.Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); *International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company*, 585 F.Supp. 261 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985). *See also Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 213 (4th Cir. 1982) (dicta); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982) (dicta).

SUMMARY OF ARGUMENT

Under the Sixth Circuit's interpretation, an employee benefit plan would qualify for the § 4(f)(2) exclusion *only* if the employer can prove that the plan's terms are justified by directly related age-based cost factors. This highly restrictive reading is not supported by either the plain language of the ADEA or its legislative history. Further, the PERS plan predates the ADEA; thus, under this Court's still-viable decision in *McMann*, it could not have been conceived as a subterfuge to evade the statute and therefore falls within the § 4(f)(2) exclusion.

A bona fide employee benefit plan which provides differing benefits to older and younger workers is not unlawful under the ADEA unless it is a subterfuge to evade the ADEA's purposes. 29 U.S.C. § 623(f)(2). Cost considerations are not the only justification which can be advanced to meet the employer's burden. Often, evidence produced by the employer to explain its benefit plan will demonstrate the plan's origins, which may include the cost considerations or other reasons underlying the plan's terms, and as a practical matter establish lack of subterfuge.

It should not, however, be the employer's burden to *prove* that the plan is not a subterfuge. The term "subterfuge," which implies intentional evasion, means the same as "pretext for discrimination." *McMann*, 434 U.S. at 203 ("[A] subterfuge is a scheme, plan, stratagem, or artifice of evasion"). Under the formulation used by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and its progency, the ultimate burden of proving intentional discrimination never shifts from the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Thus, after the employer has articulated a legitimate, nondiscriminatory reason for the plan's terms, the burden should shift back to the plaintiff to show that the

plan is in fact a subterfuge to evade the ADEA. Accordingly,

> [A] defendant may avoid liability [under § 4(f)(2)] . . . by establishing that the provision under which [plaintiff] was excluded was not a subterfuge to evade the purposes of the Act . . . [T]his may be done by proving that the provision was motivated by a legitimate business or economic purpose . . . By way of rebutting or avoiding this affirmative defense, it will of course be open to the claimant to attempt to show that instead of a business or economic purpose, the actual motivation for her exclusion was an ongoing 'scheme' . . . designed to thwart the purposes of the ADEA.

Crosland v. Charlotte Eye, Ear And Throat Hospital, 686 F.2d at 215 (citation omitted).

ARGUMENT

I. ECONOMIC JUSTIFICATION IS NOT THE SOLE METHOD OF ESTABLISHING THAT AN EMPLOYEE BENEFIT PLAN IS "BONA FIDE" WITHIN THE MEANING OF SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

A. The § 4(f)(2) Defense Is Available To All Bona Fide Employee Benefit Plans.

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, generally prohibits discrimination in "compensation, terms, conditions, or privileges of employment, because of . . . age." 29 U.S.C. § 623(a)(1). However, the ADEA's coverage is not unlimited. On the contrary, the ADEA specifically excludes actions taken pursuant to a bona fide employee benefit plan. Section 4(f)(2) of the ADEA provides:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> • • • •

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section [12(a)] of this [Act.]

29 U.S.C. § 623(f)(2). The language of section 4(f)(2) is clear and unambiguous. To come within this exemption, three requirements must be satisfied: (1) there must be a bona fide employee benefit plan; (2) the employer must observe the terms of that plan; and (3) the plan must not be a subterfuge to avoid the purposes of the ADEA. *See, e.g., EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 223; *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *Smart v. Porter Paint Co.*, 630 F.2d 490, 493 (7th Cir. 1980).[1]

The Sixth Circuit would impose additional requirements on the availability of § 4(f)(2) which would greatly limit the applicability of the exemption. In essence, the Sixth Circuit determined that when a plan offers lesser or no benefits to older employees, the § 4(f)(2) defense is available only where the cost of providing equal benefits to an older worker is greater because of age-related factors. This conclusion contradicts the plain language of

[1] An employee benefit plan is deemed to be bona fide if it "exists and pays benefits." *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977); *Smart v. Porter Paint Co.*, 630 F.2d at 494; *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980). For example, employee welfare benefit plans are defined by the Employee Retirement Income Security Act of 1974 as "any plan, fund, or program . . . maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, *disability*, death or unemployment, or vacation benefits . . ." 29 U.S.C. § 1002(1) (1988) (emphasis supplied).

the ADEA as well as the legislative intent underlying the exemption.

Any argument that a plan is disqualified from being a "bona fide employee benefit plan" solely *because* it provides differing benefits to older and younger workers misses the point. As discussed below, the fact that a plan may pay less benefits to or exclude older workers goes to the issue of whether the plan is a subterfuge to evade the ADEA, not to the genuineness of the plan itself. *See, e.g., Cipriano v. Board of Education of City School District*, 785 F.2d 51, 55 (2d Cir. 1986) ("The way the plan is structured affects only whether it might be a subterfuge to evade the purposes of the Act, not whether it qualifies generically for the shelter of § 4(f)(2)").[2]

B. The Language and Legislative History Of § 4(f)(2) Do Not Support A Restrictive Reading Of The Exception.

There is no support in the text or legislative history of the ADEA for the Sixth Circuit's narrow view of the purpose of the employee benefit plan exemption. Certainly, the legislative history indicates that one of the factors which may have motivated Congress to include the benefit plan exemption was a concern that high benefit costs might discourage employers from hiring older workers. This concern, however, in no way supports the Sixth Circuit's requirement of a cost justification before § 4(f)(2) can be applied.

The intent of § 4(f)(2), as its plain language suggests, was totally to exempt bona fide employee benefit

[2] As the Court of Appeals for the Fifth Circuit concluded, "The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly descriptive sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any." *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974).

plans from the coverage of the Act unless there is a showing that the plan is a subterfuge to evade the ADEA. The starting point for an analysis of the subterfuge question should be this Court's oft-cited pronouncement in *United Air Lines, Inc. v. McMann*:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of [the ADEA], "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense.

434 U.S. at 203 (1977). Words such as "scheme, plan, stratagem, or artifice of evasion" carry strong connotations of intent or purpose. Thus, the plain language of the statute, coupled with this Court's definition of "subterfuge," call merely for an examination of whether a particular benefit plan conceals purposeful discrimination on the basis of age.

In view of this clear language, there is no reason to turn to the legislative history. *McMann*, 434 U.S. at 198-99 ("[L]egislative history . . . is irrelevant to an unambiguous statute."). The Fifth Circuit likewise reached this conclusion in *Brennan v. Taft Broadcasting Company*, 500 F.2d 212, when considering a profit sharing plan which, it was argued, was not eligible for the § 4(f)(2) exclusion because it had no age-related cost factors. Citing this Court's decision in *Braunstein v. Commissioner of Internal Revenue*, 374 U.S. 65 (1963), the Fifth Circuit found first that there was no reason to search the legislative history for a "Congressional purpose" when the statutory language is clear. Second, the court observed the "practical difficulty" of attempting to determine in each individual case whether the challenged conduct is "within the Congressional purpose." Third, the court noted that a statute is of little use in warning the public of prohibited conduct if clear language is not conclusive, stating, "It is hardly reasonable

to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine whether what a statute plainly says is what it really means." 500 F.2d at 217.

Moreover, the legislative history supports the view that a cost defense is not mandatory under § 4(f)(2). For example, during the Senate hearings on the ADEA, Senator Javits recommended that "the age discrimination law should not be used as the place to fight the pension battle but that *we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.*" Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) (emphasis added).

Similarly, Congressman Dominick Daniels, a member of the General Subcommittee on Labor which held the hearings on the ADEA in the House, stated, "[T]he bill takes into full consideration . . . the problem of employers in the field of pension and other benefit plans. The bill *would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans.*" 113 Cong. Rec. 34746 (1967) (emphasis added). In addition, the House Education and Labor Committee stated in its report on the ADEA, "[Section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. *This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans.*" H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2217 (1967) (emphasis added).

The legislative history of the ADEA thus does not suggest that a plan must be justified by specific age-related

cost considerations in order to qualify for the exemption. To the contrary, both the plain language of § 4(f)(2) and its legislative history carve out a broad exception which expressly allows employers to treat older workers differently than younger workers under employee benefit plans.

It is true that the Department of Labor's 1969 Interpretative Bulletin ("I.B.") provided that:

> [a] retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

34 Fed. Reg. 9709 (1969), codified as 29 C.F.R. § 860.120. This language, however, is not exclusive; thus it clearly does not establish an "equal cost" method as the sole means of qualifying for § 4(f)(2).

When Senator Javits quoted this language in Congress prior to the 1978 ADEA amendments, he likewise did not identify the "equal cost" method as exclusive. 124 Cong. Rec. S4450-51 (March 23, 1978). Even if he had, of course, these remarks would have been made long after passage of the ADEA and thus would not form part of the ADEA's legislative history. *United Air Lines, Inc. v. McMann*, 434 U.S. 200 n. 7 ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

II. A BONA FIDE EMPLOYEE BENEFIT PLAN IS PROTECTED BY SECTION 4(f)(2) UNLESS IT IS A SUBTERFUGE TO EVADE THE ADEA.

As stated above, the threshold requirement for eligibility for the § 4(f)(2) exclusion is that the challenged employee benefit plan be a "bona fide employee benefit plan" in that it exists and pays substantial benefits to

covered employees. *Cipriano v. Board of Education*, 785 F.2d at 54. The only limitation placed on § 4(f)(2) by Congress is that the plan may not be a subterfuge to evade the ADEA.

Usually, evidence produced by the employer in explaining its bona fide benefit plan will also establish that the plan was not designed as a subterfuge to evade the purposes of the ADEA. If, as here, the plan predates the act, it cannot be a subterfuge. *McMann*, 434 U.S. at 203. In addition, where the employer demonstrates that the plan is based on age-related cost factors, or is otherwise justified, for example by some business purpose, it can be concluded that the employer did not intend to evade the Act.

A. This Court's Previous Ruling That An Employee Benefit Plan Which Predates The ADEA Need Not Show Cost Or Other Business Justification To Qualify For The § 4(f)(2) Exclusion Was Not Disturbed By the 1978 ADEA Amendment.

In *United Air Lines v. McMann*, this Court ruled on the precise question at issue here—whether an employee benefit plan which existed prior to enactment of the ADEA must nevertheless demonstrate a business or economic purpose for differentiating between older and younger workers in order to be excluded from the ADEA's prohibitions by virtue of § 4(f)(2). In deciding whether or not a retirement plan established in 1941 and containing a mandatory retirement age was a "subterfuge" to evade the Act, this Court concluded that "we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." *McMann*, 434 U.S. at 203.[3]

[3] The Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634, was enacted in 1967. Pub.L. 90-202, Dec. 15, 1967, 81 Stat. 602.

Following this Court's *McMann* decision, which noted that the ADEA could not be interpreted to prohibit involuntary retirement "without a clear, unambiguous expression in the statute," 434 U.S. at 199, Congress amended § 4(f)(2) by adding a provision explicitly barring mandatory retirement plans from § 4(f)(2) protection.[4] Congress did not amend the remaining language of § 4(f)(2) to require any particular proof, such as a business justification, for other plans which come within § 4(f)(2).[5]

Had Congress wished to nullify *McMann* in its entirety, it could easily have done so by further amending § 4(f)(2). *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) (Congress could have modified the definition of subterfuge and added a cost justification requirement); *EEOC v. State of Maine*, 644 F.Supp. 223, 226 (D.Me. 1986) ("If Congress had wished to state that a plan's chronology alone would not satisfy the 'subterfuge' prong of section 4(f)(2), it could have plainly said so."). Since the amendment only adds language providing that mandatory retirement plans are not protected by § 4(f)(2), it can be assumed that Congress

[4] The amendment reads:

> Sec. 2.(a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual." Pub.L. No. 95-256, § 2(a), 92 Stat. 189 (April 6, 1978).

[5] The amendment did not reiterate the language which this Court construed in *McMann*; it merely added an additional restriction prohibiting mandatory retirement. Under traditional canons of statutory construction, even if the amendment had repeated the § 4(f)(2) language, it would have to be considered as a "continuation of the original law." 1 Sutherland on Statutory Construction, § 22.33 (4th ed. 1985). *See also Sierra Club v. Secretary of Army*, 820 F.2d 513, 522 (1st Cir. 1987).

"meant no more than it expressly stated." *Id.* at 226-27. *See also EEOC v. County of Orange*, 837 F.2d at 422; *EEOC v. Cargill*, 855 F.2d 682, 686 (10th Cir. 1988).

Thus, contrary to the Sixth Circuit's conclusion, Congress did not "expressly repudiat[e]" *McMann*—it merely supplied the express language on mandatory retirement which this Court found lacking in the statute. Therefore, this Court's *McMann* decision is still valid inasmuch as it concludes that an employee benefit plan which predates the ADEA cannot be a subterfuge to evade the Act. *EEOC v. Cargill, supra*; *EEOC v. County of Orange, supra*; *EEOC v. State of Maine, supra*; *International Brotherhood of Electrical Workers, Local 1439, AFL-CIO v. Union Electric Company, supra.*[6]

B. A Plan Which Is Justified By Age-Related Cost Factors Cannot Be A Subterfuge.

While cost justifications were not placed in evidence in this case, it should be made clear as part of this Court's treatment of these issues that age-based cost considerations can justify offering lesser or no benefits to older workers under an employee benefit plan, and such a plan is protected by § 4(f)(2). During the Senate hearings on the ADEA, Senator Javits articulated a need for flexibility in the bill as proposed, stating his concern that the bill intended to promote the hiring of older workers might in practice have the opposite effect and instead "may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters." Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (here-

[6] *See also Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d at 213; *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (dicta).

inafter Senate Hearings) at 24 (prepared statement of Sen. Javits); *see also id.* at 27 (testimony of Sen. Javits).

Immediately thereafter, Senator Smathers, who co-sponsored S. 830, testified in favor of an exception for employee benefit plans. Senate Hearings at 29-30 (Testimony of Sen. Smathers). Subsequently, the bills introduced in both the House and Senate for debate included § 4(f)(2). See 113 Cong. Rec. 34,738, 34,754 (1967). According to the Committee Report, the exception for employee benefit plans:

> serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita [sic] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2217.

Then, during the Senate floor debates, Senator Javits once again explained, "The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers." 113 Cong. Rec. 31255 (1967).

It appears, therefore, that § 4(f)(2) was intended to authorize the *complete exclusion* of older employees from a retirement plan when appropriate. Discussions between the majority and minority managers of the bill, Senators Yarborough and Javits, confirm this conclusion.[7] Since

[7] "Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f) of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment

Congress intended to provide for the exclusion of older workers from a benefit plan by virtue of § 4(f)(2), it follows that differences in benefits available to older and younger workers justified by age-related cost factors, should also be eligible for the exemption. A demonstration of the cost considerations which formed the basis for the plan's distinctions will show that the plan was developed for those reasons rather than as an attempt to evade the act. Thus, even if cost justification for age-based distinctions are not mandatory, evidence that such justification was relied upon is sufficient to meet the employer's defense burden. *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208 (4th Cir. 1982).

The use of age-related cost factors to justify age-based benefit restrictions has received the approval of Congress and the administrative agencies who have enforced the ADEA.[8] During discussion of the Conference Report on the 1978 amendments to the ADEA to prohibit mandatory retirement, Senator Javits, the primary employee advocate supporting the amendments, stated:

> Thus a retirement, pension or insurance plan will be considered in compliance with the statute *where the*

is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement." In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement or insurance plan.

Mr. JAVITS. I thank my colleague. That is important to business people." 113 Cong. Rec. 31255 (1967).

[8] As discussed above at part I, the controversy appears to be whether age-related cost factors are the *sole* means of justifying age limitations on benefits.

> *actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker*, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. S4450 (March 23, 1978) (emphasis supplied). Similarly, the Department of Labor's Interpretative Bulletin, which interprets the ADEA, states:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide plan. . . A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker, is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

29 C.F.R. § 860.120, 34 Fed. Reg. 9709 (June 21, 1969).[9]

Numerous federal appellate courts have also approved the use of cost considerations to justify benefit differentials based on age. *Cf. Potenze v. New York Shipping Assn., Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987) (Social Security offset justified because it resulted in significant savings); *Cipriano v. Board of Education, supra* (since goal in offering early

[9] When ADEA enforcement authority was transferred to the EEOC, these regulations were continued in effect, *see* 44 Fed. Reg. 37974 (1979), but were later republished and redesignated as 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25, 1987).

retirement incentives is to save expenses, it is reasonable to offer more to younger employees); *Patterson v. Independent School District #709*, 742 F.2d 465, 469 (8th Cir. 1984) (for "the purpose of encouraging early retirement, the sliding scale of diminishing benefits is manifestly appropriate"). Thus, cost considerations can be used to justfy age differentials in an employee benefit plan.[10]

III. ONCE AN EMPLOYER HAS ARTICULATED A LEGITIMATE, NONDISCRIMINATORY BUSINESS REASON FOR MAINTAINING AN EMPLOYEE BENEFIT PLAN PROVIDING LESSER OR NO BENEFITS TO OLDER EMPLOYEES, THE PLAINTIFF HAS THE BURDEN TO PROVE THAT THE PLAN IS A SUBTERFUGE TO EVADE THE PURPOSES OF THE ADEA.

A. A Plaintiff's Prima Facie Case May Be Rebutted With Legitimate Reasons For the Employer's Conduct. The Plaintiff Must Then Prove Pretext.

An employee benefit plan which provides differing benefits to older workers is not a *per se* ADEA violation. In a series of Title VII decisions beginning with *McDon-*

[10] Even those courts that in particular cases have not found legitimate cost factors have recognized that where such factors exist, they constitute a § 4(f)(2) defense. *See EEOC v. Westinghouse*, No. 86-1226, slip op. at 29 (3d Cir. November 30, 1988) and cases cited therein. Moreover, age-related cost factors are not the only acceptable reasons for maintaining an employee benefit plan which differentiates on the basis of age. In addition to cost considerations, other reasons may justify offering different benefits to older and younger workers as part of an employee benefit plan. *See, e.g., Potenze v. New York Shipping Association, Inc.*, 804 F.2d at 238 (non-age-based reasons); *Cipriano v. Board of Education*, 785 F.2d at 58 (legitimate business reason); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 260 n.11 (2d Cir. 1982) (reasonable business explanations); *Smart v. Porter Paint Co.*, 630 F.2d at 495 (some evidence of purpose). As the Seventh Circuit emphasized in *Smart*, the reason "is not limited to economic or business purpose," and for example may instead be legal in nature. *Id.* at 496-97.

nell Douglas Corporation v. Green, 411 U.S. 792 (1973), and continuing through *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988), this Court has consistently applied a three-step method of proof in employment discrimination cases to allow a plaintiff, when appropriate, to demonstrate disparate treatment and violation of employment discrimination laws.

McDonnell Douglas established the basic order of proof. As this Court explained in *Texas Department of Community Affairs v. Burdine*:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802, 93 S.Ct., at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 93 S.Ct., at 1825.

450 U.S. at 252-53. The Court in *McDonnell Douglas* enumerated the factors which make up the plaintiff's prima facie case in a claim of racial discrimination in hiring under Title VII. The specific requirements, however, necessarily will vary with the facts of the case. *McDonnell Douglas*, 411 U.S. at 802 n. 13.[11]

[11] For example, a plaintiff in an ADEA termination case must establish a prima facie case by showing that (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. *Ackerman v. Diamond Shamrock Corporation*, 670 F.2d 66, 69 (6th Cir. 1982). *See also Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) (an ADEA plaintiff satisfies the fourth prong of the *McDonnell Douglas* test by showing that he was replaced by a substantially younger employee with equal or inferior qualifications).

Once a prima facie case is established by the plaintiff, the burden of production then shifts to the employer to state its reasons for taking the contested employment action. *Burdine*, 450 U.S. at 253. *Id.* In so doing, the employer rebuts the presumption created by plaintiff's prima facie case, and the presumption then "drops from the case." *Id.* at 255, n. 10. Plaintiff will then have the opportunity to demonstrate that the employer's reasons were actually a "pretext for discrimination." *Id.* at 253. *See also Furnco Construction Corporation v. Waters*, 438 U.S. 567, 578 (1979). Under this proof scheme, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. If the defendant articulates a legitimate, nondiscriminatory business reason for its employment decision after a prima facie case has been established, the burden of proof remains with the plaintiff to show that the proffered reason is a pretext for discrimination.

In short, the real issue in every employment discrimination case of disparate treatment is whether or not the employer has based an employment decision on an illegal criterion. When the employer has presented facially valid reasons for its conduct, the plaintiff must in turn show that those reasons "were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis supplied).[12]

B. This Burden Of Proof Scheme Applies To The ADEA, With The Burden Remaining On The Plaintiff To Prove That The Employer's Legitimate Reasons Were In Fact A Subterfuge.

The *McDonnell Douglas* burden of proof scheme has been relied upon in virtually every ADEA case of disparate treatment not involving § 4(f)(2). *See, e.g., Dale*

[12] *Accord Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442, 1449 (1987) (when an affirmative action plan is offered as the rationale for an employment decision, the plaintiff retains the burden of proving its invalidity).

v. Chicago Tribune Company, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987) (discharge); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (failure to promote); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (discharge).

Numerous courts have applied *McDonnell Douglas* in interpreting the exception under § 4(f)(1) allowing employer conduct based upon reasonable factors other than age. For example, the Fifth Circuit in *Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981), summarized the burden of proof under § 4(f)(1) as follows:

> If an ADEA plaintiff succeeds in proving his prima facie case, the employer must adduce proof that the plaintiff was discharged for good cause or because of some reasonable factor other than age . . . However, only the burden of producing evidence shifts to the employer. After the defendant goes forward with evidence that the discharge was based on some reason other than age, the plaintiff still bears the burden of persuasion to establish a case of discrimination by a preponderance of the evidence. (Citations omitted)

See also Loeb v. Textron, Inc., 600 F.2d at 1015-16 (*McDonnell Douglas* approach is appropriate for use in § 4(f)(1) [reasonable factor other than age] and § 4(f)(3) [employer's right to discharge or discipline for good cause] cases). The reasoning of these courts also supports the application of the *McDonnell Douglas* proof scheme to cases where the exception under § 4(f)(2) is raised by the employer to meet its burden of production.

Indeed, the Sixth Circuit previously employed a type of *McDonnell Douglas* approach in § 4(f)(2) cases involving mandatory retirement. In *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981), the court, noting that the plan in question "appears to have been adopted for the same

reason that many companies and governmental agencies have adopted optional retirement plans," found "no evidence that Trailways' retirement plan was adopted . . . as a stratagem or artifice." 635 F.2d at 581. It can be presumed that such "evidence" would have had to have been produced by the plaintiff. Likewise, affirming a grant of summary judgment in favor of the employer in *Thompson v. Chrysler Corporation*, 569 F.2d 989 (6th Cir. 1978), the Sixth Circuit observed that "the plaintiff made no showing of the existence of a genuine issue as to whether the plan under which she was retired is a subterfuge to evade the purposes of the Act." 569 F.2d at 992.

There is no persuasive reason why the *McDonnell Douglas* proof scheme is not applicable when the employer's action falls under the § 4(f)(2) exception. Section 4(f)(2) declares that "it [is] not unlawful . . . to observe the terms of a bona fide employee benefit plan . . . which is not a *subterfuge* to evade the purposes of [the ADEA]." 29 U.S.C. § 623(f)(2) (emphasis supplied). As noted above, this Court has already defined "subterfuge" as a "scheme, plan, stratagem, or artifice of evasion," *McMann*, 434 U.S. at 203, which requires employer conduct that is at least intended as a "pretext." It appears, therefore, that Congress intended to exempt from the ADEA's prohibitions action taken pursuant to a bona fide benefit plan as long as it is not a coverup for intentional discrimination.

The § 4(f)(2) "subterfuge" provision embodies the same concept as *Burdine*'s "pretext for discrimination." In either situation, once the employer has articulated a legitimate nondiscriminatory business reason for its actions, the plaintiff still has the opportunity to show that the employer's proffered reason was a ruse, and that the real intent was to discriminate. The Fourth Circuit adopted this approach in *Crosland v. Charlotte Eye, Ear*

and Throat Hospital. Holding that an employer satisfies its burden by showing a legitimate reason for the challenged provision, the court observed that the plaintiff could try to rebut by attempting to show that the plan instead was a continuing device to evade the ADEA, stating:

> [W]e hold that defendant may avoid liability for excluding claimant from the 1968 primary plan by establishing that the provision under which she was excluded was not a subterfuge to evade the purposes of the Act. We further hold that this may be done by proving that the provision was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it.
>
> By way of rebutting or avoiding this affirmative defense, it will of course be open to the claimant to attempt to show that instead of a business or economic purpose the actual motivation for her exclusion was an ongoing "scheme, plan, stratagem or artifice of evasion," *McMann*, 434 U.S. at 203, 98 S.Ct. at 450, designed to thwart the purposes of the ADEA, *i.e.* that the plan as it affected her *was* a subterfuge. Relevant for this purpose would be any evidence . . . that might bear upon the [defendant's] motivation.

686 F.2d at 215-16 (emphasis in original).

Thus, in a § 4(f)(2) case involving a challenge to an employee benefit plan, the plaintiff can make out a prima facie case by proving (1) that he was a member of the protected class; (2) he was refused a benefit; (3) he would have been eligible for the benefit but for his age; and (4) the benefit is provided to younger employees. Under *McDonnell Douglas* and *Burdine*, this creates a rebuttable presumption of intentional discrimination, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for so devising the terms of the plan.

The employer can meet this burden of production with evidence that the plan predated the ADEA or by explaining its non-age-based reasons for placing the age restriction in the plan. Once the employer comes forward with this evidence, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.

Thereafter, as in Title VII or other ADEA cases, the plaintiff will have the opportunity to prove that the employer's proffered reason is in fact a "pretext for discrimination"—the plaintiff in a § 4(f)(2) situation must prove that the employer's conduct actually is a subterfuge to evade the ADEA. *Crosland*, 686 F.2d 208. Thus, the employer's burden is to articulate the reason for the age differential, and the burden of proving "subterfuge" remains with the plaintiff, where it belongs.

It would be inappropriate to place upon the employer asserting a § 4(f)(2) defense the burden of proving that the plan was not a subterfuge. Such a requirement would in fact force the employer to attempt to prove a negative —the absence of subterfuge—or the "absence of discriminatory motive," which this Court declined to do in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. at 25 (1978). In fact, it places the entire burden of showing a lack of discrimination on the employer—and no onus whatsoever on the plaintiff to meet the ultimate burden of proving intentional discrimination, which under *Burdine*, "never shifts" from the plaintiff. 450 U.S. at 253. Forcing the defendant to *prove* "lack of subterfuge" in order to establish a § 4(f)(2) defense would make it far easier for a plainitff to succeed than if there were no ADEA exception for employee benefit plans.

It is not surprising that those courts which have placed the entire "subterfuge" burden on defendant employers have had significant difficulty explaining how, in fact, that burden can successfully be met. For example, having

determined in *EEOC v. Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982) that the "employer who invokes § 4 (f) (2) is required to disprove subterfuge," the Second Circuit noted that it expected the employer to offer "reasonable business explanations." 672 F.2d at 260 n. 11. Subsequently, in *Cipriano v. Board of Education*, the same court found there were legitimate reasons for the employer's age-based retirement incentive, but then still required the employer to "come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did." 785 F.2d at 58. In apparent recognition that this additional requirement lacked any rationale, the Second Circuit asked that the EEOC participate in the case on remand or issue guidelines to help the court determine the "meaning of subterfuge," thus leaving employers completely confused as to their proof obligations under § 4(f) (2). *Id.* at 59.

This confusion can be eliminated, however, by this Court holding that where an employer shows a legitimate reason for providing lesser or no benefits to older employees, that showing will suffice to meet any burden which can reasonably be placed on an employer of showing lack of a discriminatory motive. Once that showing is made by the employer, it should be incumbent upon the plaintiff to attempt to show the presence of unlawful intent. This analysis, once again, is consistent with the *McDonnell Douglas/Burdine* formulation and provides the only sensible application of the "subterfuge" language found in § 4(f) (2).

CONCLUSION

For the reasons stated, EEAC respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for the Amicus Curiae Equal Employment Advisory Council

December 14, 1988

* Counsel of Record

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE NATIONAL PUBLIC EMPLOYERS LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANT

Of Counsel:
JAMES BAIRD
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

GLEN D. NAGER
(Counsel of Record)
ANDREW M. KRAMER
M. LANE HOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939
Counsel for Amicus

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a retirement program's denial of disability retirement benefits to employees age 60 and over (and provision instead of only early or regular retirement benefits) must be justified by age-related cost factors in order to qualify for protection under the "bona fide employee benefit plan" exemption of § 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
AN AGE-BASED VARIANCE IN EMPLOYEE BENEFITS NEED NOT BE JUSTIFIED BY AGE-RELATED COST FACTORS IN ORDER TO QUALIFY FOR PROTECTION UNDER THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION OF § 4(f)(2) OF THE ADEA	6
A. An Age-Related Cost Justification Limitation Cannot Be Derived From Or Reconciled With The Statutory Language	7
B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of And The Legislative Purpose For The § 4(f)(2) Exemption	17
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) 9, 10
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 16
Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988) 14
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 9
Burns v. Alcala, 420 U.S. 575 (1975) 7
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 8
Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982) 15
Donovan v. Anheuser-Busch, Inc., 666 F.2d 315 (8th Cir. 1981) 9
EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) 10
EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988) 15
EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988) 16
EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982) 15-16
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) 15
EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294 (7th Cir. 1985) 16
EEOC v. Home Ins. Co., 672 F.2d 252 (2d Cir. 1982) 14
EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) 9, 30
Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) 8, 9-10, 11
Germann v. Levy, 553 F. Supp. 700 (N.D. Ill. 1982) 16

TABLE OF AUTHORITIES—Continued

Page

Graczyk v. United Steelworkers, 763 F.2d 256 (7th Cir.), *cert. denied*, 474 U.S. 970 (1985) 16
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 16
Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980) 7
Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987) .. 14
Karlen v. City Colleges, 837 F.2d 314 (7th Cir.), *cert. denied sub nom. Cook County College Teachers Union, Local 1600 v. City Colleges of Chicago*, 108 S. Ct. 2038 (1988) 13-14
Lorillard v. Pons, 434 U.S. 575 (1978) 12-13
Perrin v. United States, 444 U.S. 37 (1979) 7
Potenze v. New York Shipping Ass'n, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987) 15
Shea v. Vialpando, 416 U.S. 251 (1974) 7
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 16
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 13-14
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) ..... *passim*

STATUTES AND REGULATIONS

Age Discrimination in Employment Act of 1967 ("ADEA"), § 4(a)(1), 29 U.S.C. § 623(a)(1) .. 4, 6, 10
ADEA, § 4(f)(2), 29 U.S.C. § 623(f)(2) ..... *passim*
Davis-Bacon Act of 1931, 40 U.S.C. § 276a(b) 12
Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* 8
ERISA, 29 U.S.C. § 1002(1) 11
ERISA, 29 U.S.C. § 1002(2)(A) 10-11
ERISA, 29 U.S.C. § 1002(3) 10
Fair Labor Standards Act of 1939, 29 U.S.C. § 207(e)(4) 12
Fair Labor Standards Act Amendments of 1966, P.L. No. 89-601, 80 Stat. 830 19-20

TABLE OF AUTHORITIES—Continued

	Page
Service Contract Labor Standards Act of 1965, 41 U.S.C. §§ 351, 351(a)(2)	12
Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), 29 U.S.C. §§ 301-309 (repealed), *reprinted in* 1958 U.S. Code & Admin. News, 72 Stat. 1172	12
WPPDA, 29 U.S.C. § 303	12
WPPDA, 29 U.S.C. § 303(a)(1)	12
42 U.S.C. § 2000e-14 (repealed)	18
29 C.F.R. § 860.120, 34 Fed. Reg. 9709 (June 21, 1969)	14
29 C.F.R. § 1625.10(2)(b)	9
29 C.F.R. § 2510.3-1	10-11
LEGISLATIVE MATERIALS	
S. 1103, 90th Cong., 1st Sess. (1967)	23-24
H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967* ("*EEOC Legislative History*"), at 74	25, 26
S. Rep. No. 723, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History*, at 105	26
A Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid, 113 Cong. Rec. 1089-90, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History*, at 60	20
Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (Aug. 1, 2, 3, 15, 16 and 17, 1967)	24-25
Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (March 15-17, 1967)	20-21, 22, 24

TABLE OF AUTHORITIES—Continued

	Page
The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in EEOC Legislative History*, at 16	18, 19-20
Research Materials Accompanying the Secretary of Labor's Report (1965)	19
113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68	20
113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71	23
113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72	23
113 Cong. Rec. 31255 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 146	27
113 Cong. Rec. 34740 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 151	27-28
113 Cong. Rec. 34745 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 156	28
113 Cong. Rec. 34750 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 161	28
MISCELLANEOUS	
Basic Patterns: Collective Bargaining Negotiations and Contracts (BNA) No. 1068, at 48:2 (May 8, 1986)	30
Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts (BNA) No. 1067, at 43:4 (Apr. 21, 1986)	30
Fundamentals of Employee Benefit Programs 2 (Employee Benefit Research Institute, 3d ed. 1967)	7-8
M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* (1964)	8
M. Wermel & G. Beideman, *Employee Benefit Programs* (1957)	8
Major Collective Bargaining Agreements: Severance Pay and Layoff Benefit Plans, U.S. Dept. of Labor, Bulletin No. 1425-2 (1965), at 23	30

TABLE OF AUTHORITIES—Continued

	Page
Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 Notre Dame L. Rev. 323 (1980)	16
Successful Employee Benefit Plans (Prentice-Hall, Inc. ed. 1952)	8-9
The Total Approach to Employee Benefits (A. Deric ed. 1967)	8
Websters II Riverside University Dictionary (1984)	7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL PUBLIC EMPLOYERS LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANT

INTEREST OF THE AMICUS[1]

The National Public Employers Labor Relations Association ("NPELRA"), a non-profit association organized under the laws of Illinois, represents 2,300 labor relations and personnel professionals who work on behalf of states, counties, cities, and special governmental districts throughout the United States. Many of these governmental entities maintain, and many of NPELRA's members are involved in administering, regular and early retirement plans, disability retirement plans, and other

[1] Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.

types of employee benefit plans. Some of these benefit plans are negotiated with representatives of employee groups; others are created by state and/or local law and regulation. Thus, the resolution of the issue presented in this case—involving whether a retirement program's denial of disability retirement benefits (but not early or regular retirement benefits) to employees age 60 and over must be justified by age-related cost factors to qualify for protection under § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(f)(2)—is of significant interest to NPELRA and its members.

STATEMENT

1. The Public Employees Retirement System of Ohio ("PERS") entitles public employees who satisfy certain eligibility conditions to receive monthly retirement benefits upon the termination of their employment. J.S. App. A3, A9. A regular retirement pension is available to any employee who has attained the age of 70; an early retirement pension is available to any employee who is age 60 or over and has five or more years of service. J.S. App. A31-A32. A disability pension is available to any employee who has at least five years of credited service and has become physically unable to perform the requirements of her job. J.S. App. A3, A9. An employee is ineligible for the disability pension, however, if she is age 60 or over, or is receiving another disability retirement benefit from any Ohio state or municipal program. J.S. App. A9. The statutory age limitation on receipt of disability retirement benefits under PERS has existed since 1933. J.S. App. A3. In 1976, Ohio amended the statute to provide that the disability pension would equal or exceed 30% of an employee's final average salary. J.S. App. A24.

2. In June 1985, June Betts, a 61-year-old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCBMRDD"), became disabled and could no longer perform work-related duties. J.S. App. A21, A23. HCBMRDD advised Betts that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts applied to PERS for the more valuable disability retirement benefits,[2] but PERS told her that she was ineligible for those benefits because of her age. *Ibid.* Betts then elected both to receive early retirement benefits (plus health benefits) and to file suit under the ADEA, claiming that the State had compelled her to retire by denying her disability retirement benefits. *Ibid.*

3. On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," it found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated in the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, HCBMRDD and PERS had constructively discharged, and thus involuntarily retired, her in violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

---

[2] Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, equalled only $158.50 per month. J.S. App. A24.

4. A divided panel of the Sixth Circuit affirmed. J.S. App. A2-A19. It began by noting that, under § 4 (a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." *Id.* at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exception in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to "agree" with the district court that "'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors'" (*ibid.* (citation omitted)).

Citing federal regulations and two courts of appeals' decisions, the court explained that, "[u]nder the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." J.S. App. A5. The court then found that the plan could not be justified by any such business purpose, because, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification." J.S. App. A6. Thus, without addressing the district court's constructive discharge and involuntary retirement findings, the court affirmed.

SUMMARY OF ARGUMENT

The court below held that, in order to qualify for the exemption of § 4(f)(2) of the ADEA, an age-based variance in employee benefits must be justified by age-related cost considerations. This age-related cost justification limitation on § 4(f)(2) cannot be squared with the language or legislative history of the statute.

The language of § 4(f)(2) indicates that Congress intended the exemption to cover the gamut of employer-sponsored fringe benefit programs. In terms of ordinary English usage, industrial practice, and legislation in existence at the time of enactment, the phrase "any bona fide employee benefit plan" plainly refers to any and all ongoing administrative programs for the provision of non-wage and non-salary compensation. The "such as" phrase that modifies the phrase "any bona fide employee benefit plan" merely provides examples of such employee benefit plans. The "subterfuge" phrase that modifies the phrase "any bona fide employee benefit plan" requires inquiry into the employer's subjective intent, and thus cannot be the statutory touchstone for an objective, age-related cost justification limitation on § 4(f)(2).

The legislative history confirms this understanding of the statutory language. It shows that Senator Javits proposed the enacted language both because he believed that a broad exemption was necessary to encourage the hiring of older workers and because he believed that regulation of employee benefit plans was a complicated subject meriting an entirely distinct and comprehensive statutory scheme. Indeed, he brought to his colleagues' attention the fact that he had recently introduced a bill to create such a distinct and comprehensive statutory scheme, and this bill defined the phrase "employee benefit plan" to encompass the gamut of employer-sponsored fringe benefit plans. The legislative history further indicates that Congress understood the meaning, purpose, and

intended breadth of Senator Javits' proposal, and that, on this understanding, Congress chose to enact Senator Javits' proposal, rather than the express age-related cost justification limitation proposal of Senator Smathers, or the case-by-case "arbitrariness" approach of the Johnson Administration.

ARGUMENT

AN AGE-BASED VARIANCE IN EMPLOYEE BENEFITS NEED NOT BE JUSTIFIED BY AGE-RELATED COST FACTORS IN ORDER TO QUALIFY FOR PROTECTION UNDER THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION OF § 4(f)(2) OF THE ADEA

Section 4(a)(1) of the ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Section 4(f)(2) of the statute, however, qualifies § 4(a)(1)'s prohibition, by providing that it shall not be unlawful for an employer:

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

29 U.S.C. § 623(f)(2). The court below held that, in order to qualify for § 4(f)(2)'s protection, an age-based variance in employee benefits must be justified by age-related cost considerations. In so holding, it is unclear whether the court ruled (as the district court ruled) that § 4(f)(2) applies only to those types of "plans" where the cost of providing a benefit varies according to age, or whether it ruled (as the federal regulations and the

court of appeals' decisions it cites ruled) that an age-based differential in benefits is a "subterfuge" to evade the purposes of the ADEA unless the differentiation is specifically attributable to age-related costs. In either event, the court below was wrong: an age-related cost justification limitation on § 4(f)(2) cannot be squared with the language, legislative history, or purposes of § 4(f)(2).

A. An Age-Related Cost Justification Limitation Cannot Be Derived From Or Reconciled With The Statutory Language

This Court has long held that, "unless otherwise defined, words [used in a statute] will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). *See also Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). On that view, § 4(f)(2) must apply to all ongoing administrative programs for the provision of non-wage compensation—including those without age-related cost justifications (such as disability retirement, severance pay, sick leave, unemployment compensation, and retirement incentive plans)—that were not conceived to accomplish discrimination in terms or conditions of employment or in compensation not conferred through employee benefit plans.

1. On its face, § 4(f)(2) applies to "any bona fide employee benefit plan." 29 U.S.C. § 623(f)(2). The term "any" signifies that Congress intended the exemption to be comprehensive in scope. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974). The phrase "bona fide" simply means that a plan must be authentic—that is, it must "'exist[] and pay[] benefits.'" *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977) (citation omitted). The phrase "employee benefit" refers to "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer"—i.e., to any "fringe

benefit." *Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987); *see also Websters II Riverside University Dictionary* 115 (1984). Finally, the term "plan" refers to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898; *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217-219 (1987) (defining term "plan" in Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*). Thus, when viewed in terms of its ordinary English meaning, the language of § 4(f)(2) exempts every ongoing administrative program that provides non-wage compensation to employees and that is not a "subterfuge" to evade the purposes of the ADEA.

The conclusion that Congress intended § 4(f)(2) to have this broad coverage is bolstered by the meaning given to the phrase "employee benefit plan" in the industrial relations practice that pre-existed the ADEA's enactment in 1967 and that continues to exist today. *Cf. California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604 (1980) (interpreting the term "seniority system" in Title VII by reference to industrial relations practice and national labor policy). In that practice, the phrase "employee benefit plan" was and is understood to refer to, among other things, credit union plans, short- and long-term disability benefit plans, disability retirement plans, home financing plans, insurance plans, disability insurance plans, pensions plans, profit-sharing plans, savings plans, scholarship plans, stock purchase plans, termination incentive and severance allowance plans, and certain vacation, sick leave, and holiday benefit plans. *See The Total Approach to Employee Benefits* 83-124, 506 (A. Deric ed. 1967); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 13, 20-23, 103-110 (1964); M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-31 (1957); *Successful Employee Benefit Plans* 74-91 (Prentice-Hall, Inc. ed. 1952). Nothing in the statutory language suggests that Congress intended in any way to depart from this broad understanding of the phrase "employee benefit plan." *Accord* 29 C.F.R. § 1625.10(2)(b) ("[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.'").

That Congress modified the phrase "any bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan" does not, as some courts have suggested, provide support for an age-related cost justification limitation on § 4(f)(2)'s plain meaning. *See, e.g., EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 224 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). For one thing, at the time the statute was first adopted, many retirement, pension, or insurance plans—such as defined contribution pension plans, profit-sharing retirement plans, and many disability retirement plans—did and still do not have age-related cost justifications; thus, the age-related cost-justification limitation cannot be derived from the "types" of plans listed in the "such as" phrase. *Accord Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) (profit-sharing retirement plan). Second, the "such as" phrase merely provides examples of the plans included in the phrase "any bona fide employee benefit plan." It does not purport to define or qualify that phrase, as an age-related cost justification limitation would do. *See id.* at 215; *see generally Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981). Finally, the "such as" phrase purports only to illustrate the kinds of *plans* that § 4(f)(2) covers, and the concept of a "plan" does not in any conceivable sense relate to the variables affecting the cost of providing particular *benefits*. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d at 216-217; *see generally Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-

219 (distinction between statutory terms "plan" and "benefits" is significant).

Nor can § 4(a)(1)'s prohibition on age discrimination in employee "compensation" provide the necessary touchstone for an age-related cost limitation on § 4(f)(2) or, for that matter, for any other restriction on § 4(f)(2). Section 4(f)(2) is a limitation on § 4(a)(1), not *vice versa*. Because of § 4(f)(2), § 4(a)(1)'s prohibition only applies to employee "compensation" that is not conferred through an employee benefit plan. Thus, while § 4(a)(1) applies to age discrimination in employee "payroll practices" (*see Alford v. City of Lubbock*, 664 F.2d at 1272 & n.11), and to age discrimination in benefits that do not require the maintenance of an ongoing administrative program—i.e., a "plan" (*see EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1396 (9th Cir. 1984)), it does not, because of § 4(f)(2), generally apply to age discrimination in ongoing administrative programs that provide non-wage, non-salary compensation.

Significantly, the distinction between employee "compensation"—covered by § 4(a)(1)—and employee compensation conferred through "employee benefit plans"—protected by § 4(f)(2)—is well established in law as well as in industrial relations practice. In particular, ERISA regulates only employee compensation conferred through "employee benefit plans." ERISA defines the phrase "employee benefit plan" to have the broad meaning that was and is today well-established in industrial relations practice.[3] Consistent with the traditional view of that phrase,

[3] ERISA defines the phrase "employee benefit plan" to encompass both "employee pension benefit plan[s]" and "employee welfare benefit plan[s]." 29 U.S.C. § 1002(3). The phrase "employee pension benefit plan" is defined as any plan that:

> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond[.]

[Continued]

the Department of Labor ("DOL") has found that ERISA does not regulate employer "payroll practices." *See* 29 C.F.R. § 2510.3-1 (excluding from definition of "employee benefit plan" such items of compensation as: payment for work performed, including overtime pay, shift premiums, holiday premiums, and weekend premiums; payment out of the employer's general assets for time not worked, such as for medical reasons, or while on vacation, military duty, jury duty, training, or sabbatical; an on-premises facility for dining, such as a cafeteria, or a first aid room; holiday gifts; and special sales to employees). And this Court has made clear that the statutory phrase "employee benefit plan" does not encompass benefits where their provision does not require the maintenance of ongoing administrative programs—i.e., programs for determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records. *See Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-219.

Of course, Congress enacted ERISA in 1974 and, therefore, its definitional provisions do not provide any direct insight into the intent of the framers who enacted

[3] [Continued]

29 U.S.C. § 1002(2)(A). The phrase "employee welfare benefit plan" includes:

> any plan, fund, or program . . . established or maintained . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

§ 4(f)(2) of the ADEA in 1967. But other legislation in existence at the time Congress enacted § 4(f)(2) provides the necessary evidence that the phrase "employee benefit plan" was also then understood broadly to cover all programs for providing non-wage, non-salary compensation. Specifically, nine years prior to the ADEA's enactment, Congress enacted the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), 29 U.S.C. §§ 301-309 (repealed), *reprinted in* 1958 U.S. Code Cong. & Admin. News, 72 Stat. 1172, which defined the phrase "employee benefit plan" to include all "employee pension benefit plan[s]" and "employee welfare benefit plan[s]". *See* 29 U.S.C. § 303. The WPPDA further provided that:

> The term "employee welfare benefit plan" means any plan, fund, or program . . . for the purpose of providing . . . through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

29 U.S.C. § 303(a)(1). Numerous pre-ADEA laws enacted both before and after the WPPDA in 1958 similarly embodied this broad understanding of the phrase "employee benefit plan".[4] Accordingly, since Congress can

[4] *See, e.g.*, 29 U.S.C. § 207(e)(4) (Fail Labor Standards Act of 1939 specifies that, in calculating an employee's "regular rate" of wages, an employer should exclude employee benefits, including "contributions . . . for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees"); 40 U.S.C. § 276a(b) (Davis-Bacon Act of 1931 defines "bona fide fringe benefits" to include plans or programs for the provision of medical or hospital care, pensions on retirement or death, compensation for injuries or illness, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, and other bona fide fringe benefits); 41 U.S.C. §§ 351, 351(a)(2) (Service Contract Labor Standards Act of 1965 defines "fringe benefits" to include medical or hospital care, pensions on retirement or death, compensation for injuries or illness, unemployment benefits, life insurance, disability, sickness and accident insurance, vacation and holiday pay, costs of apprenticeship and other bona fide fringe benefits).

be presumed to use words in their ordinary legal sense, the phrase "any bona fide employee benefit plan" must be read as prima facie protection for the gamut of employee fringe benefit programs, including those without age-related cost justifications (such as disability retirement, severance, sick leave, and unemployment compensation plans). *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

2. That the phrase "any bona fide employee benefit plan" was intended to cover all ongoing administrative programs that may vary non-payroll compensation items on the basis of age—including those without age-related cost justifications—does not mean that all such programs are lawful under the ADEA. Section 4(f)(2) withholds its protection from any bona fide employee benefit plan which is a "subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. § 623(f)(2). But, as this Court held in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203, the "subterfuge" language indicates only that Congress intended to prevent employers from using § 4(f)(2) to circumvent one of the statute's prohibitions. And, as explained above, § 4(f)(2) itself makes clear that the ADEA does not prohibit an employer from observing the terms of a plan that varies employee benefits on the basis of age. Thus, a "subterfuge" cannot be found simply because the employer creates or follows an employee benefit plan that varies benefits on the basis of age, or because the plan does not have an age-related cost justification.

Rather, a "subterfuge" may be found only where an employer has designed and used a plan specifically to discriminate against older workers with respect to either their terms and conditions of employment or their compensation that does not require and is not conferred through an employee benefit plan. That is, to be a "subterfuge," the plan must be specifically designed involuntarily to deprive older workers of terms and conditions of employment that younger persons enjoy—for example, a plan that is purposefully designed and used as a cover

for the involuntary retirement of older persons. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-125 (1985); *Karlen v. City Colleges*, 837 F.2d 314, 319-320 (7th Cir.), *cert. denied sub nom. Cook County College Teachers Union, Local 1600 v. City Colleges of Chicago*, 108 S. Ct. 2038 (1988). Alternatively, the plan must be specifically conceived to evade the statutory prohibition against age discrimination in the payment of wages or benefits that do not require an ongoing administrative scheme—by, for example, using an employee benefit plan to continue what previously had been a discriminatory payroll practice. *Cf. EEOC v. Home Ins. Co.*, 672 F.2d 252, 257-263 (2d Cir. 1982). Without proof of an intent to evade a statutory prohibition unrelated to the payment of fringe benefits, however, the variance in benefits under the plan would constitute nothing more than the discrimination that § 4(f)(2) expressly permits.[5]

That the intent of a plan's designers must be to evade one of the statute's prohibitions means that, in certain circumstances, a "subterfuge" cannot possibly be found. First, as the DOL initially suggested in 1969, where benefits variances are justified by age-related costs, no "subterfuge" can exist; it would be unreasonable to find an intent to drive older employees from the workforce where an employer incurs equal costs on behalf of similarly-situated employees of different ages. *See* 29 C.F.R. § 860.120, 34 Fed. Reg. 9709 (June 21, 1969). Second, as this Court held in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203, no "subterfuge" can be found where a discriminatory benefit provision pre-dates the enactment of the ADEA; no employer is so prescient that it could

[5] Even where an intent exists to induce older persons to leave the work force, the employer may be acting entirely lawfully and consistent with the purposes of the ADEA—as in the case of a voluntary retirement incentive program. *See Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988); *Henn v. National Geographic Soc'y*, 819 F.2d 824, 827 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

have designed a plan to evade a statutory prohibition that was not yet in existence.[6] Finally, while there is no *per se* requirement that an age-based benefit distinction have an economic or business purpose, undisputed proof of such a purpose would dispel any possible inference of "subterfuge"; the specific intent necessary to deny the protection of § 4(f)(2)—i.e., a purpose to drive older persons from the workforce or to vary their wage or salary compensation on the basis of age—cannot be found where the undisputed evidence shows a non-arbitrary, business-related purpose for the distinction. *See, e.g., Potenze v. New York Shipping Ass'n*, 804 F.2d 235, 238-239 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 212-216 (4th Cir. 1982).[7]

[6] To be sure, as Justice White argued in *McMann*, maintaining a plan (or readopting a discriminatory provision when making other changes to a plan) after the enactment of the ADEA requires a deliberate decision on an employer's part. *See* 434 U.S. at 207 (White, J., concurring). But, whether this point is valid or not, a majority of this Court rejected it at the time, and, until overruled by Congress, the majority's holding on the "subterfuge" issue is binding.

The court below suggested that (J.S. App. A4), in amending the ADEA in 1978, Congress overruled this aspect of the *McMann* decision. But Congress did not modify or redefine the "subterfuge" language in response to the *McMann* majority's rejection of Justice White's argument; it simply amended the statute to prohibit involuntary retirement. Moreover, as both Appellant and the Commonwealth of Pennsylvania as *amicus curiae* explain (App. Br. at 39-48; Penn. Br. at 20-21, 25-26), while the legislative history indicates that Congress disagreed with the result of the *McMann* decision, its focus was entirely on the lawfulness of involuntary retirement provisions; the application of the "subterfuge" clause to other plan provisions was simply not addressed. In these circumstances, Congress cannot be deemed to have overruled the *McMann* majority's interpretation of the "subterfuge" clause. *Accord EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988).

[7] While an agreement arising from collective bargaining is not completely immune from ADEA challenge, *see EEOC v. County of*

Concomitantly, the "subterfuge" language cannot properly be used to import an age-related cost justification limitation into § 4(f)(2). "In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. Thus, the "subterfuge" language must refer to a specific "intent . . . to evade a statutory requirement," and is inconsistent with any "*per se* rule requiring an employer to show an economic or business purpose" in order to qualify for the § 4(f)(2) exemption. *Ibid.* A *per se* age-related cost justification limitation is even more at odds with the "subterfuge" language than is a *per se* economic or business purpose requirement: by making the "subterfuge" inquiry turn on a particular kind of objective proof, it essentially removes the illicit subjective intent requirement from the statute. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The "subterfuge" language cannot properly be interpreted in this fashion. *Accord EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1494-1495 (3d Cir. 1988) (Hutchinson, J., concurring); *Germann v. Levy*, 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982).[8]

Calumet, 686 F.2d 1249, 1255-57 (7th Cir. 1982), bona fide collective bargaining negotiations do not lend themselves easily to unlawful collaboration and conspiracy. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-83 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-71 (1982). Thus, courts should give "maximum deference" to collective bargaining agreements (*see, e.g., EEOC v. Fox Point-Bayside School Dist.*, 772 F.2d 1294, 1302-03 (7th Cir. 1985); *Graczyk v. United Steelworkers*, 763 F.2d 256, 262-63 (7th Cir.), *cert. denied*, 474 U.S. 970 (1985)), and should rarely, if ever, find that age-distinctions in collectively bargained benefit plans are a "subterfuge" to evade the ADEA. *Accord* Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 Notre Dame L. Rev. 323, 329 (1980).

[8] The court below not only found (J.S. App. A4) that Congress had overruled the *McMann* Court's interpretation of the "subterfuge" clause in the 1978 ADEA amendments, it also apparently equated the "subterfuge," "economic or business purpose," and "age-related cost justification" inquiries. *See* J.S. App. A5-A6. As noted earlier, we agree with Appellant and the Commonwealth of Pennsylvania as *amicus curiae* that Congress did not overrule the *McMann* Court's interpretation of the "subterfuge" language. But, even if Congress in 1978 did overrule the "subterfuge" aspect of the *McMann* decision, the court below still erred in equating the "subterfuge," "economic or business purpose," and "age-related cost justification" inquiries.

As Justice White pointed out in his *McMann* concurrence, even if a pre-Act plan can be a "subterfuge," proof of a "business or economic purpose" is not necessary to establish the absence of a "subterfuge." 434 U.S. at 207. Rather, an employer need simply offer proof that its plan is not designed to circumvent one of the ADEA's prohibitions—such as the prohibition against discharges. While proof of a "business or economic purpose" for a benefit variance will plainly suffice, it is not required. We agree with Appellant (at 16-23) and the Commonwealth of Pennsylvania (at 26-28) that nothing in the 1978 statute or its legislative history is to the contrary.

Moreover, even if a "business or economic purpose" were required, it would be wrong to equate the "economic or business purpose" and "age-related cost justification" inquiries. An age-related cost justification is just one example of an "economic or business purpose." Nothing in the 1978 amendment or its legislative history purports to restrict the kinds of economic or business purposes that may be offered to justify an age-based plan distinction.

In this case, a "business or economic purpose" exists. As the district court found (J.S. App. A25-A26), when Appellant limited eligibility for disability retirement benefits to persons under age 60 and ineligible for other retirement benefits, it had a legitimate economic or business purpose for doing so—to wit, to provide benefits to persons who "otherwise have no source of income during their disability."

B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of And The Legislative Purpose For The § 4(f)(2) Exemption

An age-related cost justification limitation is also inconsistent with the legislative history of and the legislative purpose for the § 4(f)(2) exemption. Such a limitation fails to recognize Congress' other reasons for including § 4(f)(2), as amended, in the statute.

1. Congress first began considering the problem of age discrimination in employment in 1964. At that time, Congress ordered the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected," and to report back to Congress with recommendations for legislation to prevent "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (repealed).

The Secretary of Labor did so. *See The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) (*"Secretary's Report"*), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 16-41 (1981) (*"EEOC Legislative History"*). His June 1965 Report began by emphasizing that "not all discrimination in this area is 'arbitrary'." *EEOC Legislative History*, at 19. It found that, in contrast to race discrimination, age discrimination is rarely based on a mere dislike for older workers. *Id.* at 20. Rather, it found that age discrimination is principally based on three other factors: (a) unfounded assumptions about the effect of age on ability to perform; (b) valid conclusions about the effect of age on ability to do a job; and (c) institutional arrangements—such as pension, seniority, insurance, and promotion from-within-policies —that, although often designed to protect or support older workers, may have an adverse impact on their employment opportunities. *Ibid.* Importantly, the Report made clear that only decision making based on unfounded assumptions about the effect of age on ability constitutes "arbitrary age discrimination," although the Report added that, in isolated circumstances, institutional arrangements could be used arbitrarily to restrict the employment opportunities of older workers. *Id.* at 20, 22.

As noted, the Report expressly characterized employee benefit plans as "institutional arrangements" which might adversely affect the employment of older workers. *EEOC Legislative History*, at 33. But, importantly, it also stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Ibid.* It found that "cost considerations do not . . . always operate against the older worker," that "[r]elatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons," and that, "[e]ven in cases where [employers] mentioned pension and insurance [plans as a barrier to employment], cost was not the principal factor involved." *Ibid.*[9] Rather, the Report noted that employers had cited limited work expectancy of older workers, morale issues associated with employing persons who would not qualify for employee benefits, and presumed inability to pass physical examinations as the principal employee benefit plan-related barriers to the full employment of older workers. *Id.* at 33-34. The Report concluded that "[c]ase-by-case examination is necessary" to determine which benefit "plan-induced limitations on employment can be considered to constitute arbitrary discrimination[.]" *Id.* at 34.

2. Following the issuance of the Secretary's Report, a group of Senators proposed, in 1966, to amend the Fair Labor Standards Act ("FLSA") to prohibit age discrimination in "terms, conditions, or privileges" of employment, unless age was a necessary bona fide occupational

---

[9] The *Research Materials Accompanying The Secretary of Labor's Report* 10 (1965) indicated that, of the employers surveyed, only 6.7% cited the costs and provisions of pension plans as a reason for excluding older workers; only 1.4% cited the costs and provisions of health insurance as a reason; and only 1.2% cited the costs and provisions of life insurance as a factor.

qualification. *See EEOC Legislative History*, at 43. While Congress did not enact this proposal (*see id.* at 47), it did direct the Secretary of Labor to submit specific legislative proposals to implement the recommendations that he made in his Report. *See* Fair Labor Standards Act Amendments of 1966, P.L. No. 89-601, 80 Stat. 830.

On January 23, 1967, the Secretary did so. After President Johnson issued a message to the Congress stating that "[w]e must end arbitrary age limits on hiring" (*A Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid*, 113 Cong. Rec. 1089-90, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History*, at 60-61), Secretary of Labor Willard Wirtz submitted a draft "Age Discrimination in Employment Act of 1967" to Congress. *See id.* at 62-63. In his cover letter, Secretary Wirtz stated that the bill's "prohibitions are designed to bar arbitrary age discrimination." *Id.* at 62. With respect to so-called "institutional arrangements," the Secretary stated that the bill authorized research that would be aimed at "reducing barriers to the employment of older workers." *Id.* at 63. Section 4(f) of the bill, however, also provided that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

The Senate Hearings on this bill, which Senator Yarborough introduced as S. 830 on February 3, 1967 (*EEOC Legislative History*, at 66), commenced on March 15, 1967. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on*

Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (March 15-17, 1967) ("*Senate Hearings*"). On the first day of these hearings, Senator Javits, who had previously introduced his own age discrimination bill, S. 788, criticized § 4(f)(2) of the Administration bill on the ground that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Senate Hearings, at 27. Senator Javits announced that he would therefore soon propose an amendment to the Administration bill that would grant employers "a degree of flexibility" with respect to employee benefit plans. *Ibid.* In his view, a "fairly broad exemption . . . for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of S. 830, similarly indicated on this first day of the hearings that a "deficiency" existed in the Administration's bill. *Senate Hearings*, at 29. Senator Smathers read the Administration's bill as requiring employers to provide older workers "the same private pension rights and other fringe benefits" as they provide to younger workers. *Ibid.* Senator Smathers argued that such a requirement would impose unwarranted costs on employers and actually induce them to discriminate against older workers in the hiring process. *Id.* at 29-30. He therefore proposed the following amendment:

> (g) Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for pro-

> viding medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees.

Id. at 30. Senator Smathers suggested that this amendment, by equalizing the employer's cost obligations, would make the bill fairer to the employer and reduce the perverse hiring incentives with which he was concerned. *Ibid.*

Senator Murphy next urged the committee, however, to reconsider the bill that he and Senator Javits had introduced in 1966. *Senate Hearings*, at 32. In doing so, Senator Murphy reiterated the Secretary of Labor's finding that, in his studies, only a small percentage of employers cited the cost of providing pension and insurance benefits as a reason for age discrimination in employment. *Id.* at 34. Moreover, he referred the committee to a Bureau of Labor Statistics ("BLS") report which purported to show that the costs of health and insurance plans do not vary greatly with age and that pension and insurance costs of hiring older workers are often overstated. *Ibid.*

Secretary Wirtz then took the podium in defense of the Administration's bill. *Senate Hearings*, at 33. He emphasized that the Administration bill's "prohibition is of 'discrimination' in the sense of '*arbitrary* age discrimination.' This is reflected particularly in Section 4(f)," which he characterized as "obviously broad." *Id.* at 39 (emphasis in original). Secretary Wirtz stated that § 4(a)'s prohibition on age discrimination "reflects simply the significant fact that what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies, a degree of protection against discrimination on the basis of age. . . ." *Id.* at 43. He noted, however, that, under §§ 4(a) and (f) of the Administration bill,

"[w]hether different eligibility requirements or benefit levels for older workers would constitute arbitrary discrimination . . . would require determination under the facts of each case." *Id.* at 47. But, in response to questions, he opined that "the effect of the provisions in section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about." *Id.* at 53.

3. Senator Javits was apparently not persuaded by Secretary Wirtz's reassurances about the effect of § 4(f)(2) of the Administration bill. The next day, on the Senate floor; he reiterated his concern that the Administration's bill was inflexible and that it would encourage, rather than discourage, age discrimination in employment. *See* 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. He thus proposed that § 4(f)(2) of the Administration bill be replaced with an amendment making it lawful for an employer:

> (2) to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual[.]

113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72.

Senator Javits stressed that he did not mean to minimize the importance of older workers receiving adequate pension benefits and the like. 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. But he stated that, in his view, "the age discrimination law is not the proper place to fight this particular battle." *Ibid.* Indeed, he noted that he had "recently introduced a comprehensive bill to deal with this problem." *Ibid.* Significantly, the bill to which he referred, which was a precursor to ERISA, defined the phrase "employee benefit plan" to include:

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness benefits, or accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967).[10]

4. The hearings in the House evidence a clear understanding on that body's part of the events that occurred in the Senate subcommittee. *See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor*

[10] When the hearings resumed, representatives of the business community joined with Senator Javits in urging the committee to adopt a broader exception for bona fide employee benefit plans than the Administration bill provided. Like Senator Javits, Towers, Perrin, Forrester & Crosby, Inc., a leading employee benefits consulting firm, recommended that the Administration bill be amended to exempt "any other bona fide employee benefit plan" from the statute's operation, stating that, "[i]n the absence of such exclusions, . . . hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)[.]" *Senate Hearings*, at 280. The American Life Convention, the Health Insurance Association of America, and the Life Insurance Association of America similarly expressed concern that the Administration's bill would disrupt many established insurance, welfare, pension, and other employee benefit plans. *Id.* at 296. And the National Association of Manufacturers argued that any regulation of employee benefit plans "should be accomplished knowingly and intelligently, not inadvertently by legislation designed to resolve an entirely different matter." *Id.* at 323.

of the House Committee on Education and Labor, 90th Cong., 1st Sess. (August 1, 2, 3, 15, 16 and 17, 1967) ("*House Hearings*"). Secretary Wirtz admitted to the House subcommittee that the Senate subcommittee had amended § 4(f)(2) of the Administration bill in order to clarify its scope. *House Hearings*, at 39-40. Numerous witnesses urged the House subcommittee to do so too, reiterating the concerns expressed in the Senate that the Administration bill would disrupt existing plans and discourage the hiring of older workers. *See id.* at 63, 68-70, 413, 418, 480-481, 495-496, 496-497, 499-500. In doing so, they proposed language like that Senator Javits proposed in the Senate and that is essentially identical to the language ultimately enacted. *See id.* at 63, 480-481, 496, 499. And, as the Chairman of the House subcommittee explained, the proposed language would "relieve[] [employers] of the responsibility for the health and welfare and fringe benefits to employees" covered by the bill. *Id.* at 68 (remarks of Rep. Dent).

On October 23, 1967, after the conclusion of these hearings, the Committee on Education and Labor reported H.R. 13054 favorably to the House as a whole. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77. The bill so reported included the amendment proposed by the witnesses in the House hearings. *See id.* at 94. In discussing the amended § 4(f)(2), the House Committee's report stated:

> It is important to note that exception [2] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original

bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, *supra*, *reprinted in EEOC Legislative History*, at 77. Twelve days later, the same bill was reported favorably to the Senate, with a Senate committee report to the same effect. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in EEOC Legislative History*, at 108.[11]

In floor debate before the Senate, on November 6, 1967, Senator Javits engaged Senator Yarborough, the floor manager of the bill, in the following colloquy to make certain that the full effect of his amendment was understood:

> MR. JAVITS: The meaning of this provision is as follows: *An employer will not be compelled . . . to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act*, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.

[11] Senator Javits, in his Individual Views accompanying S. Rep. No. 723, *supra*, stated that:

> the bill has also been improved by the adoption of language . . . exempting . . . bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions. The lack of any such provision was a serious defect in both S. 788 and S. 830 as originally introduced, since in its absence employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them.

Id. at 14, *reprinted in EEOC Legislative History*, at 118.

I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .

MR. YARBOROUGH: I wish to say to the Senator that that is basically my understanding of the provision . . . *[I]t means that a man who would not have been employed except for this law does not have to receive the benefits of the plan.* Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. *In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan.*

MR. JAVITS: I thank my colleague. That is important to business people.

113 Cong. Rec. 31255, *reprinted in EEOC Legislative History*, at 146 (emphasis added).

The floor debate in the House indicates that the members of this branch of Congress similarly understood that § 4(f)(2), as amended, would broadly protect employee benefit plans, even where the plans completely excluded older workers. Representative Perkins, the floor manager of the House bill, H.R. 13054, stated quite explicitly that "[w]e do not undertake to tackle the whole problem of age discrimination in employment in this bill, but we feel that we strike at the heart of the situation"; and he specifically noted that "[e]xceptions are provided in order

not to disrupt employee benefit programs, seniority systems, and the like." 113 Cong. Rec. 34740 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 151. Representative Randall, speaking in support of the bill, likewise noted that the amended bill left some things undone: ". . . there is no provision for a worker, in the 40 to 65 range, to participate in some of the pension or retirement programs available to his fellow workers." 113 Cong. Rec. 34750 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 161. Some members of the House even opposed the bill precisely because it allowed older workers to be excluded entirely from existing benefit plans and thus allowed employers to reap a "cash reward." 113 Cong. Rec. 34745 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 156. But the amended bill, with that provision and understanding, was nevertheless passed by the House (and the Senate) and eventually signed by the President into law.

5. This legislative history confirms that, in enacting the critical language in § 4(f)(2), Congress understood that it was exempting myriad fringe benefit plans and that the exemption would not be limited to benefit variances justified by age-related costs. Congress was principally concerned with promoting the employment of older workers. It understood that employee benefit plans were among the "institutional barriers" to the employment of older workers. But it had no reason to believe that the age-related costs of providing such benefits were the only employee benefit plan-related cause of the unemployment problem. To the contrary, the Secretary's studies, of which Congress was plainly aware, had suggested that limited work expectancy, morale issues associated with employing persons who would not qualify for benefits, and presumed inability to pass physical examinations were even greater employee benefit plan-related barriers to the employment of older persons than were the increased costs (if any) of providing such benefits to them.

Congress acted on this larger and more subtle understanding of the age discrimination in employment problem when it enacted the existing version of § 4(f)(2). It expressly declined to adopt Senator Smathers' proposal, which would have limited the exemption to benefit variances justified by age-related costs. Likewise, it declined to adopt the Administration bill, which Secretary Wirtz had suggested would allow case-by-case inquiry into the issue of whether different eligibility requirements or benefit levels for older workers constituted "arbitrary" age discrimination in employment. Instead, it adopted Senator Javits' proposal in order, as Senator Javits stated, to grant employers "a degree of flexibility" with respect to employee benefit plans and thereby to "facilitate hiring rather than deter it and [to] make it possible for older workers to be employed without the necessity of disrupting those systems." *Senate Hearings*, at 27-28.

An age-related cost justification limitation on § 4(f)(2) is simply irreconcilable with this legislative history. It ignores Congress' failure to adopt Senator Smathers' proposal for an express age-related cost justification limitation. It authorizes case-by-case scrutiny of individual terms of employee benefit plans, even though Congress dismissed such an approach when it declined to adopt the Administration's proposal. It fails to acknowledge that employee benefit plan-related barriers to the full employment of older workers extend beyond age-related benefit costs and thus does not fully respond to the institutional concerns which Congress had found resulted in the unemployment of older persons. And it suggests that myriad employee benefit plans, many of which pre-dated the statute's enactment, are unlawful and must be changed, notwithstanding Congress' clear intent to prevent the disruption of employee benefit plans and to leave their regulation to a more studied and comprehensive statutory scheme (like the one Senator Javits had con-

temporaneously proposed).[12] Such inconsistencies with legislative history and purpose confirm that the age-related cost justification limitation is statutorily unreasonable.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:
JAMES BAIRD
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

December 1988

GLEN D. NAGER
(Counsel of Record)
ANDREW M. KRAMER
M. LANE HOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939
Counsel for Amicus

[12] For example, the age-related cost justification theory would disrupt numerous disability retirement plans. As the Commonwealth of Pennsylvania makes clear in its brief, over half of the states in this country limit disability retirement benefits to persons ineligible for regular or early retirement benefits. Surveys indicate that the majority of private plans similarly limit eligibility for disability retirement benefits. *See Basic Patterns: Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:2 (May 8, 1986).

The disruption would, of course, extend to other kinds of employee benefit plans as well. Some courts have held that the cost of providing severance pay does not vary with age and, moreover, that denying severafice pay on the basis of pension or retirement eligibility discriminates against the older worker. *EEOC v. Westinghouse Elec. Corp., supra.* But surveys show that, both in 1967 and today, large numbers of severance pay plans condition their benefits on ineligibility for pensions. *See Major Collective Bargaining Agreements: Severance Pay and Layoff Benefit Plans*, U.S. Dept. of Labor, Bulletin No. 1425-2 (1965), at 23; *Basic Pattern: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 1067, at 43:4 (Apr. 24, 1986). There is nothing in the statute or the legisiative history to suggest that Congress intended the wholesale invalidation of these severance pay plans.

No. 88-389 (8)

FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Appellant,

v.

JUNE M. BETTS,

Appellee.

On Appeal from
the United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM IN SUPPORT OF APPELLANT

JOHN K. VAN DE KAMP
Attorney General of the State of California

N. EUGENE HILL
Assistant Attorney General

HENRY G. ULLERICH
Supervising Deputy Attorney General

SILVIA M. DIAZ
Deputy Attorney General
(Counsel of Record)
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010
Telephone: (213) 736-3576

Attorneys for Amicus Curiae
State of California
State Teachers' Retirement System

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a benefit plan that predates applicability of the Age Discrimination in Employment Act ("ADEA") can be a "subterfuge" to evade the purposes of the act.

2. Whether the ADEA prohibits a benefit plan from terminating disability benefits when a disabled member becomes eligible for retirement benefits, or requires benefit plans to provide disability benefits in perpetuity.

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I

A BENEFIT PLAN THAT PREDATES APPLICABILITY OF A.D.E.A. CANNOT, AS A MATTER OF LAW, BE A SUBTERFUGE..... 4

II

A BENEFIT PLAN MAY, IN COMPLIANCE WITH A.D.E.A., PROVIDE FOR DISABILITY BENEFITS TO TERMINATE WHEN A DISABLED MEMBER BECOMES ELIGIBLE FOR RETIREMENT BENEFITS..... 7

A. The Legislative Pupose of the ADEA Is to Prevent Involuntary Retirement of Able Employees, Not to Regulate the Benefits of Disabled Employees 8

1. Age-Based Distinctions in Benefits Are Cost-Justified and Not Arbitrary..... 8

2. The Legislative History of the 1967 Enactment of the ADEA Makes Clear Congress' Intent to Permit Age-Based Distinctions in Bona Fide Benefit Plans 9

3. The 1978 Amendment to the ADEA Was Intended to Prohibit the Involuntary Retirement of Able Employees and Reflects No Departure from the Act's Original Intent Not to Invalidate Age-Based Distinctions in Bona Fide Benefit Plans..... 10

TABLE OF CONTENTS–Continued

Page

B. The Issue Is Not Involuntary Retirement But Whether Benefit Plans Are Required to Provide Employees Disability Benefits in Perpetuity 12

C. To Hold Now That in 1978 Congress Required All Benefit Plans to Provide Lifetime Disability Benefits Would Create a Huge Unfunded Liability in the Nation's Pension Systems..... 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Alford v. City of Lubbock, Texas, 664 F.2d 1263, 1271 (5th Cir. 1982) 6

E.E.O.C. v. Home Insurance Company, 672 F.2d 252, 258 (2d Cir. 1982) 6

E.E.O.C. v. Maine, 823 F.2d 542 (1st Cir. 1987) 6

E.E.O.C. v. Orange County, 837 F.2d 420, 422 (9th Cir. 1988) 6

Equal Employment Opportunity Commission v. Cargill, Inc., ___ F.2d ___ (10th Cir., Aug. 26, 1988, Case No. 84-2692) 6

Florida v. Long, ___ U.S. ___, 108 S.Ct. 2354 (1988) 14

Gonsalves v. Caterpillar Tractor Co., Inc. 634 F.2d 1065, 1066 (7th Cir. 1980) 6

International Brotherhood of Electrical Workers, Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985) 8

United Airlines, Inc. v. McMann, 434 U.S. 192, 203 (1977) 4, 5, 11

STATE STATUTES

Cal. Ed. Code §§ 22122 1

23901 1

23902 (former § 14213) 1, 2

23903 1

23911 1

TABLE OF AUTHORITIES–Continued

Page

23913 2

23919 2

Cal. Stats. 1895, ch. 166, p. 170 1

1972, ch. 1089, § 9, p. 2032 2

RULES

United States Supreme Court Rule 36.4 1

MISCELLANEOUS

113 Cong. Rec. 31255 (1967) 9

124 Cong. Rec. H2276 (daily ed. Mar. 21, 1978) remarks of Rep. Weiss 5

124 Cong. Rec. H2277 (daily ed. Mar. 21, 1978) remarks of Rep. Waxman 5

124 Cong. Rec. S4450 (daily ed. Mar. 23, 1978) remarks of Sen. Javits 5

Age Discrimination in Employment Act (29 USC § 621 et seq.) 2

§ 4(a)(1), (29 USC § 623(a)(1)) 4

§ 4(f)(2), (29 USC § 623(f)(2)) ..... *passim*

Cal. Pensions & Investment Age January 25, 1988, p. 18 1

Cal. Teachers Ret. Bd., 1987 Annual Report p. 38 1

Hgs. on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967) 9

TABLE OF AUTHORITIES–Continued

Page

Hgs. on H.R. 4221 before the General Subcommittee on Labor of the House Committee on Educ. & Labor, 90th Cong., 1st Sess., 40 (1967) 9

H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 529 5

H.R. Rep. No. 493, 95th Cong., 1st Sess. 5, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 506, 508 ..... 5, 12

Pub. L. No. 93-259, 88 Stat. 74 (May 1, 1974)..... 2

Sen. Rep. No. 493, 95th Cong., 1st Sess. 3, 5, 10, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 506, 508, 513..... 10, 11

INTEREST OF AMICUS CURIAE

Amicus Curiae State of California operates the State Teachers' Retirement System ("California STRS") and respectfully submits this brief, by its Attorney General, pursuant to Rule 36.4, United States Supreme Court Rules.

California STRS is the retirement program of the State of California for educational employees. Its origin traces to 1895, when the California Legislature created a "School Teachers' Annuity and Retirement Fund" for the benefit of teachers in California's public schools. Cal. Stats. 1895, ch. 166, p. 170.

California STRS is the largest teacher's pension system in the United States, ranks fourth among public pension funds, and is the eighth largest pension system in the nation. Pensions & Investment Age, Jan. 25, 1988, p. 18. Its fund exceeds $23 billion in assets, servicing over 428,000 people. *Id.*, p. 26; California Teachers' Retirement Board, 1987 Annual Report, p. 38.

State law governing California STRS contains no provision for mandatory retirement. A member may retire as early as age fifty-five. Cal. Ed. Code, § 23901. A member may also apply for and receive disability allowance benefits if unable to perform his or her duties due to mental or physical incapacity. Cal. Ed. Code, § 22122, 23902, 23903. Under California Education Code § 23911, the disability allowance of a disabled employee unable to perform his or her duties, and who is without dependent children, terminates at age sixty and the member is eligible for retirement benefits. However, a disabled retirant retains the right to resume his or her previous employment and to reenter the system upon rehabilitation, or a retirant may choose to continue to receive retirement benefits and

to work and earn additional wages. Cal. Ed. Code, §§ 23913, 23919.

The California Legislature enacted STRS's disability allowance plan in 1972. Cal. Stats. 1972, ch. 1089, § 9, p. 2032; Cal. Ed. Code, § 23902 (former Cal. Ed. Code, § 14213). In 1974 Congress extended the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.; "ADEA") to state and local governments. Pub. L. No. 93-259, 88 Stat. 74 (May 1, 1974). Like Appellant Public Employment Retirement System of Ohio, California STRS relies on the provisions of § 4(f)(2) of the act, 29 U.S.C. § 623(f)(2), to establish the lawfulness of its disability benefit plan.

Were this Court to affirm the decision of the Sixth Circuit that a benefit plan predating applicability of the ADEA may be deemed a "subterfuge" under ADEA, that holding would apply as well to California STRS. Further, appellee Betts is arguing a benefit plan that does not provide for disability benefits after a specified age constitutes "involuntary retirement" in violation of the ADEA. Were this Court to accept her argument, it might well apply also to California STRS.

STATEMENT OF THE CASE

Amicus adopts appellant's statement of the case.

SUMMARY OF ARGUMENT

1. The ADEA was adopted to eliminate age-based discrimination in the workplace. However, Congress

sought, in the original 1967 enactment of the ADEA and in the 1978 amendment to the law, to preserve for employers the flexibility to fashion a variety of benefit plans. The ADEA therefore exempts such plans from the prohibition of age-based differences. While the exemption is not available to a plan constituting a "subterfuge" to evade the ADEA, the language of the statute, this Court's previous interpretation of that language, and the legislative history make clear that "subterfuge" means a device adopted for the purpose of evasion, and no subterfuge can be found in a plan that predates applicability of the ADEA to the employer.

2. The 1978 amendment to § 4(f)(2) of the ADEA was intended solely to prohibit the involuntary retirement of willing and able employees who were performing the duties of the job. The amendment was not intended to alter the rights of persons disabled from performing their duties. The contrary construction urged by appellee amounts to a rule that employers who offer disability benefits must do so for the lifetime of the employee. Whether there should be such a departure from the principle of cost-based pension benefits should be decided by Congress after it weighs the effects on the likelihood employers will offer disability benefits, on employers' willingness to hire older workers, and on the potential unfunded liability of the nation's pension plans.

ARGUMENT

I

A BENEFIT PLAN THAT PREDATES APPLICABILITY OF A.D.E.A. CANNOT, AS A MATTER OF LAW, BE A SUBTERFUGE

With its enactment in 1967, the ADEA prohibited arbitrary age-based discrimination in the private-sector workplace. The act declared it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). One exception to this general prohibition was, and continues to be, that an employer may "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ." ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2).

In 1977, this Court resolved a conflict among the circuits and held, inter alia, that a benefit plan established prior to the passage of the ADEA in 1967 could not be a subterfuge to evade the purposes of the act, rejecting any per se rule requiring an employer to show an economic or business purpose as then urged by the Secretary of Labor. *United Airlines, Inc. v. McMann*, 434 U.S. 192, 203 (1977). The Court held that a retirement plan that compelled involuntary retirement on the basis of age did not offend the strictures of the ADEA. The Court went on to interpret the subterfuge exception to § 4(f)(2), following the fundamental rule of statutory construction that requires a statute be given the plain meaning of its

words. The Court gave "subterfuge" its ordinary meaning – "a scheme, plan, stratagem, or artifice of evasion" – and reasoned that an employee would need "remarkable prescience" to scheme to evade an act passed years after implementation of the plan. *Ibid.*

This Court is asked to revisit the same question in light of the act's subsequent legislative history. It is urged that in 1978 Congress overruled *McMann* both regarding its involuntary retirement holding and regarding its conclusion that a benefit plan predating the act cannot be subterfuge. Mtn. to Affirm, pp. 3-4, citing to H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 529 ("plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.") Hence, appellee argues, an employer may only justify its plan by demonstrated cost considerations.

But a fair reading of that history and the specific language that Congress used when reenacting § 4(f)(2) leads to the inescapable conclusion that the legislative purpose of the amendment was to render involuntary retirements unlawful and not to address the criteria by which a benefit plan qualifies for the exception of § 4(f)(2). The amendment was not intended to alter "existing law with respect to" employee benefit plan practices. See e.g., H.R. Rep. No. 493, 95th Cong., 1st Sess. 5, reprinted in 1978 U.S. Code Cong. & Admin. News, 504,508; 124 Cong. Rec. H2276 (daily ed. Mar. 21, 1978) remarks of Rep. Weiss; 124 Cong. Rec. H2277 (daily ed. Mar. 21, 1978) remarks of Rep. Waxman; 124 Cong. Rec. S4450 (daily ed. Mar. 23, 1978) remarks of Sen. Javits.

But even more compelling is the very absence of any language in the reenacted § 4(f)(2), altering the term "subterfuge." As noted correctly in *E.E.O.C. v. Orange County*, 837 F.2d 420, 422 (9th Cir. 1988):

> [T]he 1978 amendment to section 4(f)(2) only dealt with involuntary retirement provisions. Congress could easily have invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted 4(f)(2) without amending the subterfuge language.

Several other circuits have reached the same conclusion from the language Congress used. *Equal Employment Opportunity Commission v. Cargill, Inc.* ___ F.2d ___ (10th Cir., Aug. 26, 1988, Case No. 84-2692); *E.E.O.C. v. Maine*, 823 F.2d 542 (1st Cir., 1987); *E.E.O.C. v. Home Insurance Company*, 672 F.2d 252, 258 (2d Cir., 1982); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir., 1982); *Gonsalves v. Caterpillar Tractor Co., Inc.* 634 F.2d 1066 (7th Cir. 1980).

This Court's interpretation of the subterfuge provision of § 4(f)(2) remains valid notwithstanding the 1978 amendment to the ADEA. The Sixth Circuit's holding to the contrary simply cannot be justified in light of the provision's clear, unaltered language.

For the Ohio PERS benefit plan, which predates adoption of the ADEA by several decades (Jurisdictional Stmt., p. 3), how this rule is enunciated may be less important than for California STRS. Amicus respectfully

points out that the logic of this Court's definition of "subterfuge" dictates that a plan need not predate the act but need merely *predate applicability of the ADEA to the benefit plan in question*. No more "prescience" should be attributed to the California Legislature, when it enacted STRS's disability allowance plan in 1972, two years before Congress made the ADEA applicable to state and local government, than should be attributed to a private employer adopting a benefit plan in 1965, two years before the original enactment of the ADEA.

II

A BENEFIT PLAN MAY, IN COMPLIANCE WITH A.D.E.A., PROVIDE FOR DISABILITY BENEFITS TO TERMINATE WHEN A DISABLED MEMBER BECOMES ELIGIBLE FOR RETIREMENT BENEFITS

Appellee Betts argues that even if the Ohio disability retirement plan qualifies as a bona fide benefit plan under § 4(f)(2), and even if the challenged provision can be cost justified, it still violates the ADEA because it causes or permits "involuntary retirement" in violation of the act. Mtn. to Affirm, pp. 5-6. She asserts that denial of disability benefits to an employee over age sixty compels her instead to accept retirement benefits, which, she claims, constitutes involuntary retirement. Amicus submits that a plan may lawfully provide for cessation of disability benefits to a person eligible for retirement benefits and that such a provision does not amount to an involuntary retirement proscribed by the ADEA.

A. The Legislative Purpose of the ADEA Is to Prevent Involuntary Retirement of Able Employees, Not to Regulate the Benefits of Disabled Employees

Any analysis of the provisions of the ADEA in the context of disability and retirement benefits must begin with a recognition that Congress did not intend to disrupt plans that related benefits to the employee's age.

1. Age-Based Distinctions in Benefits Are Cost-Justified and Not Arbitrary

A person's health, fitness for employment, financial needs, and life-expectancy are all highly correlated with age. Benefit plans have therefore typically used schedules of benefits and member-contributions that conform to the differential experience of different age groups. Premiums for health insurance, life insurance, and similar protection rise as adults age. Benefits under various forms of insurance fall as the covered person enters age groups where the need for protection typically is lower or where the cost of providing coverage becomes too great. These distinctions are not arbitrary but reflect the underlying economics of operating benefit programs. See *International Brotherhood of Electrical Workers, Local 1439 v. Union Electric Co.*, 761 F.2d 1257 (8th Cir. 1985).

To provide otherwise, to price such programs identically and to provide the same schedule of benefits for all persons, regardless of age, would require younger adults to subsidize older adults. Congress presumably has the power to so order, but it had no such intent to depart from prevailing practices.

2. The Legislative History of the 1967 Enactment of the ADEA Makes Clear Congress' Intent to Permit Age-Based Distinctions in Bona Fide Benefit Plans

The problem of differential treatment by benefit plans was explicitly considered by Congress in 1967 in connection with the original enactment of the ADEA.

Senator Javits, who proposed the exemption contained in § 4(f)(2), expressed concern with the early drafts of the administration's bill because it did not "provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, . . . " Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967). He also urged that "the age discrimination law should not be used as the place to fight the pension battle." *Ibid.*

Secretary of Labor Wirtz told Congress the bill's language was designed to protect the practices of existing benefit systems. *Id.*, p. 53; *see also* Hearings on H.R. 4221 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., 40 (1967).

In floor debate, Senator Javits sought and obtained confirmation that "[a]n employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers." 113 Cong.Rec. 31255 (1967).

In the 1967 enactment, it is clear that Congress intentionally avoided any proscription of age-based distinctions in benefit plans in order to permit employers to continue to base benefits on the differential needs of employees of varying ages.

3. The 1978 Amendment to the ADEA Was Intended to Prohibit the Involuntary Retirement of Able Employees and Reflects No Departure from the Act's Original Intent Not to Invalidate Age-Based Distinctions in Bona Fide Benefit Plans.

The legislative history of the 1978 Amendment makes clear that Congress was addressing only the forced retirement of active, able-bodied employees.

> The committee believes that as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age. *A person with the ability and desire to work* should not be denied that opportunity solely because of age.
>
> . . . .
>
> *For capable older workers* the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire, *provided they are still physically and psychologically able to perform their jobs* in a satisfactory manner.

Sen. Rep. No. 493, 95th Cong., 1st Sess. 3, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 506 (emphasis added).

The express purpose of the 1978 amendment to § 4(f)(2) was to vindicate this "basic civil right" and to

overrule the result reached in *McMann:* that an *able-bodied, active and willing* airline pilot could be removed from the pilot's chair and forced into retirement solely on the basis of his age.

> In *McMann* v. *United Airlines,* 542 F.2d 217 . . . , the Fourth Circuit Court of Appeals held that section 4(f)(2) did not permit mandatory retirement pursuant to the terms of a collective bargaining agreement or pension plan. To rule otherwise, the Court said, would undermine the intent of Congress, because the purpose of 4(f)(2) was to encourage the employment of older workers by permitting employe[r]s to make distinctions based on age with respect to participation in employee benefit plans.
>
> . . . The amendment to section 4(f)(2) serves to express congressional approval of the result reached by the fourth circuit in *McMann.*

Sen. Rep. No. 493, 95th Cong., 1st Sess. 10, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 513. Plainly, the forced removal, on the basis of age, of a worker on the job and capably carrying out his or her duties is fundamentally different from cost-justified differences in benefit plans for those unable to work, and it was only the former that Congress sought to address:

> In the committee's view, forced retirement extinguishes an individual's right to employment and is thus not excused by section 4(f)(2) *unless the retirement is based on some reason* other than age, *such as disability* or poor performance.

Ibid. (emphasis added).

There is no evidence that the offense Congress took at the involuntary retirement of an able employee moved

it to alter the existing rules governing age-based variations in benefit programs. In fact, there is clear evidence to the contrary:

> Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advanced in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by *Id.*, p. 5, 1978 U.S. Code Cong. & Admin. News 508.

B. The Issue Is Not Involuntary Retirement But Whether Benefit Plans Are Required to Provide Employees Disability Benefits in Perpetuity

There should be no mistake about the rule appellee would have this Court promulgate. If an employer may not terminate eligibility for disability benefits on the basis of age, then each employer covered by the act may not provide any disability benefits unless the benefits are uniformly available in perpetuity. Plans that alter eligibility or benefit levels when the disabilitant becomes eligible for Social Security would now be unlawful. Plans that terminate disability eligibility when most able-bodied employees prefer to retire would now be unlawful. Plans that reduce benefits when disabilitants no longer have minor dependents would not be unlawful.

Had Congress intended in 1978 to create a right to lifetime disability benefits, one would expect to see some recognition of the vast implications of such a decision in the legislative history. Would the rule lead employers not to offer disability programs at all? Would it undermine

Congress' express purpose in enacting the ADEA of encouraging employers to hire older workers? Would it encourage the filing of fraudulent disability claims? Would it raise business costs and reduce employment?

These possibilities are undeniable. Perhaps Congress might choose to accept these risks after weighing such questions, but it is inconceivable that it would purposely do so without a shred of evidence in the record of its deliberations.

Appellee's claim of "involuntary retirement" arises because Ohio's benefit plan, like most, has taken care to ensure that disability eligibility does not terminate until the worker is eligible for other benefits, namely retirement benefits. Were the Ohio plan to provide that disability eligibility terminates before the disabilitant qualifies for retirement benefits, there would be no claim of "involuntary retirement." Once it is conceded that Congress did not prohibit plans that terminate disability benefits at a given age, it must also be conceded that the plan is no more in violation of the ADEA if it also provides retirement benefits at or before that same age. The issue is not "involuntary retirement" but the lawfulness of plans that terminate disability benefits any time before the death of the disabilitant.

C. To Hold Now That in 1978 Congress Required All Benefit Plans to Provide Lifetime Disability Benefits Would Create a Huge Unfunded Liability in the Nation's Pension Systems

The area of pension benefits is particularly ill-suited to creative interpretation of statutes and the finding of previously unknown rights. Appellant, like California

STRS and the other pension systems in the nation, could have provided unlimited disability benefits (or no disability benefits at all) had it been told to do so, but it would then have increased its contributions to pay for the increased cost of those benefits. But Congress did nothing in 1978 – or 1967 – to put the nation's pension systems on notice of any such obligation, and in fact gave all the indications reviewed above that it was doing nothing to upset long-established benefit plans. Accordingly, the systems have continued to collect contributions on the basis of their existing benefit schedules.

For this Court now to announce that the ADEA contains a hidden mandate that every benefit plan providing disability benefits do so for the lifetime of each member would create a huge unfunded liability for each of these systems.

This simply illustrates the fact that such a major change in what is perceived as unfair discrimination in benefit plans should be addressed by Congress and not the courts. Congress could fashion a statute that, for example, imposed a *prospective* requirement of longer disability benefits, giving pension systems time to adjust their contributions and distribution of benefits in a fiscally sound manner. Cf. *Florida v. Long*, ___ U.S. ___, 108 S.Ct. 2354 (1988).

CONCLUSION

Congress would not have adopted a sweeping new rule, requiring employers who offer disability benefits to make them available for the lifetime of the employee, without explicit recognition of the enormous effects such a rule would have. In the absence of any such evidence, it must be assumed that Congress did not depart from its expressed purpose of permitting age-based distinctions in disability benefit plans that predated applicability of the ADEA.

DATED: December 14, 1988

JOHN K. VAN DE KAMP
Attorney General of the
State of California

N. EUGENE HILL
Assistant Attorney General

HENRY G. ULLERICH
Supervising Deputy Attorney General

SILVIA M. DIAZ
Deputy Attorney General
(Counsel of Record)
3580 Wilshire Boulevard, Suite 600
Los Angeles, California 90010
Telephone: (213) 736-3576

Attorneys for Amicus Curiae
State of California
State Teachers' Retirement System

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT
SYSTEM OF OHIO
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal From The
United States Court of Appeals
For The Sixth Circuit

BRIEF OF AMICI CURIAE SUPPORTING APPELLANT BY THE COMMONWEALTH OF PENNSYLVANIA AND THE AMICI STATES APPEARING ON THE INSIDE COVER

LeROY S. ZIMMERMAN
Attorney General

SUSAN J. FORNEY
Senior Deputy Attorney General
(Counsel of Record)

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

(Additional Counsel Listed Inside)

Honorable Grace Berg Schaible
Attorney General of Alaska
State Capitol
Juneau, Alaska 99811

Honorable Joseph I. Lieberman
Attorney General of Connecticut
30 Trinity Street
Hartford, CT 06106

Honorable Warren Price, III
Attorney General of Hawaii
Honolulu, Hawaii 96813

Honorable Cary Edwards
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN-112
Trenton, NJ 08625

Honorable Kenneth O. Eikenberry
Attorney General of Washington
7th Floor, Highway Licenses Bldg.
Olympia, Wash. 98504

Honorable Charles G. Brown
Attorney General of West Virginia
State Capitol, Rm. 26-E
Charleston, W. Va. 25305

QUESTION PRESENTED

Whether the 1978 amendment to Section 4(f) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2), requires employers to justify different disability retirement benefits afforded older and younger employees based on age-related cost factors, where the prior law did not require such a showing and where the amendment itself merely prohibits involuntary retirement based on age?

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI.....	1
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	10
ARGUMENT	
THE 1978 AMENDMENT OF SECTION 4(f)(2) DID NOT CHANGE THE STATUTORY MEANING OF SUBTERFUGE AS DEFINED BY THIS COURT IN UNITED AIRLINES, INC. V. MCMANN; NOR DID IT REQUIRE OTHERWISE BONA FIDE PLANS TO JUSTIFY DIFFERENCES IN BENEFITS BY SHOWING AGE-RELATED COST FACTORS.....	13
A. The Language Of The 1978 Amendment Is Clear And Provides No Support For The Decision Below	16
B. The Legislative History Does Not Support An Age Related Cost Factor Test....	19
C. The Decision Below, If Upheld, Will Adversely Affect The Retirement Systems of Many States.....	29
CONCLUSION.....	34

TABLE OF CITATIONS

CASES:	PAGE
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).....	16
Central Trust Co. v. Creditors Committee, 454 U.S. 354 (1982).....	18, 28
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).....	16
EEOC v. Cargill, 9 Emp. Ben. Cas. (BNA) 2609 (10th Cir. 1988).....	9
EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988).....	9
EEOC v. Maine, 823 F.2d 542 (1st Cir. 1987), aff'g, 644 F.Supp 223 (D.Me. 1986).....	9
Equal Employment Opportunity Commission v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988).....	9
IBEW Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985), aff'g, 585 F.Supp. 261 (E.D. Mo. 1984).....	9

CASES: PAGE

Karlen v. Colleges of Chicago,
837 F.2d 314 (7th Cir.
1988)..... 8

Reiter v. Sonotone Corp.,
442 U.S. 330, 337 (1979).... 16

SEC v. Sloan,
436 U.S. 103 (1978)..... 20

United Airlines v. McMann,
434 U.S. 192 (1977)..... 7, 10
12, 13
27

Western Airlines v. Criswell,
472 U.S. 400 (1985)..... 21

FEDERAL STATUTES:

Age Discrimination in Employment
Act of 1967,
29 U.S.C. § 623 et seq..... 1
29 U.S.C. § 623(a)..... 17
29 U.S.C. § 623(a)(1)..... 6
29 U.S.C. § 623(f)(2)..... 5, 7,
10, 13,
17

STATE STATUTES:

Ala. Code § 36-27-16(b)(1)..... 30

Alaska Stat. §§ 14.25.130,
39.35.410..... 30

STATE STATUTES: PAGE

Ariz. Rev. Stat. Ann.
§ 38-781.31..... 30

Ark Stat. Ann. §24-3-208..... 30

Colo. Rev. Stat. § 24-51-701..... 30

Conn. Gen. Stat. § 5-169(a)..... 30, 31

Cal. Code. tit. 2, art. 3,
§ 21021..... 32

Del. Code Ann. tit. 29,
§ 5524..... 32

Fla. Stat. § 121.091(4)..... 32

Ga. Code Ann. § 44-2-123..... 31

Haw. Rev. Stat. §§ 88-75,
88-76..... 30

Idaho Code § 59-1313(2)(b)..... 31

Ill. Rev. Stat. § 14-123..... 31

Ind. Code § 5-10.2-4-6..... 32

Iowa Code § 97B-50..... 32

Kan. Stat. Ann. §74-4927(a)..... 31

Ky. Rev. Stat. Ann. §§ 61.600,
61.605, 61.615(e)..... 32

La. Rev. Stat. Ann. §§ 42:581,
42:702..... 32

STATE STATUTES: PAGE

Mass. Gen. L. ch. 32, §§ 6, 7.... 31

Md. Code Ann. art. 73B, § 11..... 30

Me. Rev. Stat. Ann. tit. 5, § 17904(1)(B)..... 30

Mich. Comp. Laws Ann. §§ 38.22, 38.23..... 31

Minn. Stat. Ann. § 352.113..... 31

Miss. Code Ann. § 25-11-113..... 30

Mo. Rev. Stat. §§ 104.410, 104.515.3(5)..... 31

Mont. Code Ann. § 19-3-1002..... 31

N.C. Gen. Stat. § 135-106..... 31

N.D. Cent. Code §§ 54-52-17(3)(d), (4)(e)..... 32

N.H. Rev. Stat. Ann. § 100A:6.... 30

N.J. Rev. Stat. §§ 43:15A-42, 43:15A-43..... 30

N.M. Stat. Ann. §§ 10-11-10(D), (E)..... 31

N.Y. Retire. & Soc. Sec. Law §§ 62, 63..... 31

Neb. Rev. Stat. §§ 84-1317; 84-1323.01..... 32

Nev. Rev. Stat. § 286.620..... 32

Okla. Stat. tit. 74, § 915(B).... 32

STATE STATUTES: PAGE

Or. Rev. Stat. § 237.171(1)..... 32

Pa. Cons. Stat. Ann. tit. 71, § 5308(c)..... 30

R.I. Pub. Laws §§ 36-10-12, 36-10-13, 36-10-14..... 31

S.C. Code Ann. § 9-1-1560..... 30

S.D. Codified Laws Ann. §§ 3-12-98, 3-12-103..... 31

Tenn. Code Ann. §§ 8-36-501, 8-36-502..... 31

Tex. Code Ann. ch. 21, § 24.202..... 31

Utah Code Ann. §§ 460, 461..... 31

Va. Code Ann. § 51-111.56..... 31

Vt. Stat. Ann. tit. 3, §§ 460, 461..... 31

W. Va. Code § 5-10-25..... 32

Wash. Rev. Code Ann. §§ 41-40-210, 41-40-220..... 30

Wis. Stat. Ann. § 40.63(1)..... 30

Wyo. Stat. § 9-3-422..... 31

OTHER AUTHORITIES: PAGE

29 C.F.R. 860.120(a)(1)..... 8
29 C.F.R. 860.120(f)(1)(iii)..... 8

Conf. Rep. No. 950, 95th Cong.,
2d Sess. (March 14, 1978)..... 21, 26

123 Cong. Record 29005
(Sept. 13, 1977)
(comments of Rep. Findley).. 22
123 Cong. Rec. 29007
(Sept. 13, 1977)
(remarks of Rep. Biaggi).... 23
123 Cong. Rec. 29009
(Sept. 13, 1977)
(remarks of Rep. Pepper).... 23
123 Cong. Rec. 29010
(Sept. 13, 1977)
(remarks of Rep. Wampler)... 23
123 Cong. Rec. 29011
(Sept. 13, 1977)
(remarks of Rep. Cohen)..... 24
123 Cong. Rec. 29012
(Sept. 13, 1977)
(remarks of Rep. Grassley).. 24
123 Cong. Rec. 29013
(Sept. 13, 1977)
(remarks of Rep. Weiss)..... 23
123 Cong. Rec. 34295
(Oct. 19, 1977)
(remarks of Sen. Williams).. 26
123 Cong. Rec. 34323
(Oct. 19, 1977)
(remarks of Sen. Kennedy),.. 25

124 Cong. Rec. H 2269
(daily ed., March 21, 1978)
(remarks by Rep. Hawkins)... 27

OTHER AUTHORITIES: PAGE

124 Cong. Rec. H 2277
(daily ed. March 21, 1978)
(remarks of Rep. Waxman).... 27
124 Cong. Rec. S 4449
(daily ed. March 23, 1978)
(remarks of Sen. Williams).. 25, 26
124 Cong. Rec. S 4450
(daily ed. March 23, 1978)
(remarks of Sen. Javits).... 27

EEOC Legislative History of
the Age Discrimination
in Employment Act of 1967
(1981)..... 22

EEOC Legislative History at

402..... 22
404..... 23
406..... 23
407..... 24
408..... 24
409..... 24
410..... 23
482..... 26
510..... 25
518..... 21
519..... 26
528..... 27
535..... 27
538..... 25, 26
539..... 27

INTEREST OF THE AMICI

The Commonwealth of Pennsylvania and the amici states, like all other states, maintain statutory retirement systems for their public employees. Like the retirement systems of the State of Ohio and other states, the retirement systems of the amici draw certain age-based distinctions in determining eligibility for, and amount of, regular and disability retirement benefits. Moreover, like the retirement systems of Ohio and many other states, the retirement systems of the amici states were created prior to May 1, 1974, when the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623 et seq., became applicable to the states. The Court's decision here is thus of great interest to the amici states, because it

will bear on the lawfulness of the distinctions used in their retirement systems, and since it will have a direct impact on the administration and funding of the benefits provided.

STATEMENT OF THE CASE

The Public Employee Retirement System of Ohio ("PERS") provides three types of retirement to eligible public employees: regular retirement; early retirement; and disability retirement. Regular retirement is available to any employee who is at least 70 years old. J.S. App. A31-32.[1] Disability retirement is available to employees under 60 who have at least five years of service and who are no longer physically able to perform the duties of their jobs. J.S. App. A3, A9. The age restriction on eligibility for disability benefits has been in place since 1933, well before the ADEA was enacted. J.S. 3.

---

[1]J.S. App. refers to the appendix to the jurisdicitonal statement filed by PERS.

In June 1985, June Betts, a 61-year old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities became disabled and could no longer perform work-related duties. J.S. App. A21, A23. Her employer advised her that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts then applied to PERS for disability retirement benefits, which would have provided her a higher monthly benefit than regular retirement,[2] PERS denied

---

[2]Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, was only $158.50 per month. J.S. App. A24.

her application because of her age. Ibid. Betts then elected to receive early retirement benefits, including health benefits, and to file suit under the ADEA, claiming that Ohio had compelled her to retire by denying her disability retirement. Ibid.

On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," the court found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected

the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated by the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, the employer and PERS had constructively discharged, and thus involuntarily retired, her in violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

A divided panel of the Sixth Circuit affirmed without addressing either the constructive discharge or the involuntary retirement holdings. J.S. App. A2-A19. It began by noting that, under § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on

which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." Id. at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan - exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exemption in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in United Airlines v. McMann, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to

"agree" with the district court that "'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors'" (Ibid. (citation omitted)). Thus according to the Sixth Circuit, a benefit plan providing less valuable options to older workers would comply with the statute only where the cost of providing the older workers' benefits equals the cost of providing more generous benefits to younger workers. Id. at n.3.

In reaching this conclusion, the court accepted the reading of the 1978 amendment adopted by the Equal Employment Opportunity Commission, the Seventh Circuit Court of Appeals and the Third Circuit Court of Appeals. 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii); Karlen v. Colleges of Chicago,

837 F.2d 314 (7th Cir., 1988); Equal Employment Opportunity Commission v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988). At the same time but without saying so, it rejected the contrary position of the First, Eighth, Ninth and Tenth Circuit Courts of Appeals. EEOC v. Maine, 823 F.2d 542 (1st Cir. 1987), aff'g, 644 F.Supp 223, 226-27 (D.Me. 1986); IBEW Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985), aff'g, 585 F.Supp. 261, 264 (E.D. Mo. 1984); EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988); EEOC v. Cargill, 9 Emp. Ben. Cas. (BNA) 2609, 2611-12 (10th Cir. 1988).

SUMMARY OF ARGUMENT

In holding that a benefit plan is exempt from the ADEA under Section 4(f)(2) only if its variations in benefits are justified by age-related cost factors, the Sixth Circuit presumed that in 1978 Congress overruled all aspects of this Court's decision in United Air Lines v. McMann, 434 U.S. 192 (1977). Nothing in the language of the 1978 amendment to Section 4(f)(2) supports the court's presumption; nor, does the legislative history compel the result reached below.

The 1978 amendment simply prohibited exempt plans from mandating the retirement of employees based on age. It did not eliminate or redefine the subterfuge language discussed by this Court in McMann. Nor, did it limit

the exemption to plans with variations in benefits justified by age-related cost factors.

The legislative history, like the amendment itself, focused almost exclusively on outlawing mandatory retirement. There was no analysis of other employee benefit plan provisions, nor did Congress purport to address them. Moreover, the history makes clear that other than removing mandatory retirement provisions from the exemption, the amendment was not supposed to alter existing law which did not require justifications based either on age-related cost factors or on substantial business purposes.

Finally, if the decision of the Sixth Circuit is allowed to stand, it will create precisely the sort of disruption in the benefit plans of the

states that the exemption was intended to avoid. Many state systems that predate the ADEA draw distinctions similar to those drawn by Ohio in this case. If this Court upholds the decision below, then these plans will have to be substantially redesigned.

In McMann, this Court said that benefit plans should not be disrupted in the absence of an unambigious expression of congressional will. The Congress certainly did not express its intention to impose, on otherwise exempt plans, an obligation to justify their provisions on any basis let alone on the standards the Sixth Circuit would impose. Accordingly, the decision below should be reversed.

ARGUMENT

THE 1978 AMENDMENT OF SECTION 4(f)(2) DID NOT CHANGE THE STATUTORY MEANING OF SUBTERFUGE AS DEFINED BY THIS COURT IN UNITED AIRLINES, INC. V. MCMANN; NOR DID IT REQUIRE OTHERWISE BONA FIDE PLANS TO JUSTIFY DIFFERENCES IN BENEFITS BY SHOWING AGE-RELATED COST FACTORS

As originally enacted, Section 4(f)(2) of the ADEA (81 Stat. 603) provided that it would not be unlawful for an employer:

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

In United Air Lines v. McMann, 434 U.S. 192 (1977), the Court held that Section 4(f)(2) protected an involuntary retirement provision of a pension plan that had

been created prior to the enactment of the ADEA. The Court found that Congress had intended in Section 4(f)(2) to preserve the authority of employers involuntarily to retire employees pursuant to the terms of a bona fide pension plan. 434 U.S. at 197-202. And the Court held that the involuntary retirement provision at issue in the case was not a "subterfuge" to evade the purposes of the ADEA, because the provision had been adopted before the enactment of the ADEA and because there is no "per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." 434 U.S. at 203.

In holding that Section 4(f)(2) applies only to age distinctions justified by significant age-related cost considerations (which it equated

with the "substantial business purpose" test referenced in the McMann decision), the court below suggested that, in amending Section 4(f)(2) in 1978, Congress overruled this Court's decision in McMann. We leave to Appellant and its other amici the task of explaining in detail why McMann was correctly decided and, concomitantly, why the age-related cost justification limitation imposed by the court below is inconsistent with the intent of the Congress that enacted the ADEA in 1967. We limit our discussion here to why Congress, in amending Section 4(f)(2) in 1978, did not alter the Court's interpretation of the "subterfuge" provision, or add either a "substantial business purpose" or an "age-related cost justification" standard to Section 4(f)(2).

A. The Language Of The 1978 Amendment Is Clear And Provides No Support For The Decision Below

As this Court has often recognized, the starting point in every case involving statutory construction is "the language employed by Congress." American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), quoting, Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). Moreover, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." American Tobacco Co. v. Patterson, supra, at 68, quoting, Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

In this case the language of the 1978 amendment is perfectly clear. It added a proviso to the Section 4(f)(2) exemption for bona fide benefit plans

which states that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by Section 623(a) of this title because of the age of such individual [.]" 29 U.S.C. § 623(f)(2). The amendment did not alter the language authorizing an employer "to observe the terms . . . of any bona fide employee benefit plan which is not a subterfuge to evade the purposes of [the ADEA] . . ." Id. Nor did it repudiate this Court's interpretation of that language in McMann by further defining subterfuge or by adding an age-related cost factor test, or for that matter, any other test, to be met by bona fide plans.

If Congress wished to limit the Section 4(f)(2) exemption to the extent the Sixth Circuit suggests, it easily could have done so. The fact that it

did not should end this Court's inquiry. Central Trust Co. v. Creditors Committee, 454 U.S. 354, 359-60 (1982).

Nonetheless because the Sixth Circuit based its interpretation of the amendment entirely on what it perceived to be the legislative intent, we will proceed to address it.

B. The Legislative History Does Not Support An Age Related Cost Factor Test.

In adopting the age-related cost factor test, the Sixth Circuit discounted the plain language of Section 4(f)(2) and focused instead on what it considered to be the motive of Congress in enacting the 1978 amendment. Even if this Court were to accept the Sixth Circuit's novel approach to statutory construction, the legislative history would not support the decision below.

This Court has been "extremely hesitant to presume general congressional awareness of . . . a few isolated statements in the thousands of pages of legislative documents," and it has been even more reluctant to equate such awareness with "amendment of . . . the

rather plain meaning . . . (of statutory) language." SEC v. Sloan, 436 U.S. 103, 121 (1978)(parenthetical material supplied). Nonetheless, that is exactly what the Sixth Circuit did in this case. The court focused on one statement in the Conference Committee report on the 1978 amendment in which the conferees disagreed with this Court's holding and reasoning in McMann, and used that to read an age-related cost factor test into the Section 4(f)(2) exemption. In so doing, the court ignored the bulk of the legislative history which makes it clear that while Congress disagreed with the result in McMann, the thrust of the 1979 amendment was to eliminate mandatory

retirement provisions from the exemption.[3] Indeed, the very report cited by the court below states that the amendment was a "clarification of Section 4(f)(2) of the Act to prohibit the mandatory retirement of an employee within the protected age group pursuant to a bona fide employee benefit plan or seniority system which requires or permits such treatment." Conf. Rep. No. 950, 95th Cong., 2d Sess. (March 14, 1978), reprinted in EEOC Legislative History, at 518.

---

[3]In doing so Congress did not purport to prelude employers from proving that age is a bfoq for certain jobs, thus justifying mandatory retirement provisions in specific cases. See Western Airlines v. Criswell, 472 U.S. U.S. 400 (1985).

Comments of various members of Congress in debating the amendment bolster the conclusion that other than removing mandatory retirement from the ambit of the exception, existing law was to remain unchanged. A co-sponsor of the bill in the House described the amendment as an "effort to close the loophole in existing law which allows mandatory retirement below age 65 when provided for in a bona fide employee benefit plan." 123 Cong. Record 29005 (September 13, 1977)(comments of Representative Findley), reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967 at 402 (1981)("EEOC Legislative Hisotry"). Another co-sponsor noted that while under the section "employers could hire older workers and benefit from their employment experience without

having to incorporate them fully into company benefit plans or seniority systems", the amendment would ensure that it could not "be used to force them into early retirement"[.]", 123 Cong. Rec. 29013 (Sept. 13, 1977)(remarks of Representative Weiss), reprinted in EEOC Legislative History at 410.[4]

---

[4]The remarks of other Congressmen, too numerous to quote, establish that they too understood that, in supporting H.R. 5383, they were simply advocating the removal of age-based mandatory retirement provisions from the exemption. See 123 Cong. Rec. 29007 (Sept. 13, 1977)(remarks of Rep. Biaggi), reprinted in EEOC Legislative History at 404; 123 Cong. Rec. 29009 (Sept. 13, 1977)(remarks of Rep. Pepper), reprinted in EEOC Legislative History at 406; 123 Cong. Rec. 29010 (Sept. 13, 1977)(remarks of Rep. Wampler) ("The essence and intent of raising the age of protection to 70 under the Act is clarified in H.R. 5383 by amending Section 4(f)(2) to prevent bona fide seniority systems and pension

(FOOTNOTE CONTINUED)

The debate in the Senate took a similar course. In describing the proposed amendment, Senator Kennedy said:

> The bill clarifies the Congressional intention behind the exception to the Act which allows lesser benefits to be given to older workers in pension, retirement and insurance plans. The purpose of this provision was to ease the way for employment of older workers by allowing some differentiation in the fringe benefits that they

---

(FOOTNOTE CONTINUED)

plans from containing mandatory retirement ages for employees protected by the Act."), reprinted in EEOC Legislative History at 407; 123 Cong. Rec. 29011 (Sept. 13, 1977) (remarks of Rep. Cohen) (H.R. 5383 amends the Act in order to reduce the incidence of mandatory retirement), reprinted in EEOC Legislative History at 408; 123 Cong. Rec. 29012 (Sept. 13, 1977)(remarks of Rep. Grassley) (amendment will reduce the incidence of mandatory retirement), reprinted in EEOC Legislative History at 409.

> would get. But a couple of courts have interpreted the provision to allow for the discharge of workers even if they would otherwise fall under the Act's protection, so long as they were not covered by a pension plan. We now make clear that the differentiation is allowed for purposes of fringe benefits alone and not for purposes of allowing an earlier retirement age.

123 Cong. Rec. 34323 (Oct. 19, 1977) (remarks of Senator Kennedy), reprinted in EEOC Legislative History at 510; See also 124 Cong. Rec. S4449 (daily ed. March 23, 1978)(remarks of Senator Williams), reprinted in EEOC Legislative History at 538.

The legislative history does reflect Congress's dissatisfaction with this Court's decision in McMann. For the most part, however, that dissatisfaction stemmed from the result in that case and cannot be read as a wholesale

rejection of the Court's approach to the subterfuge issue. See Conf. Rep. No. 950, 95th Cong., 2d Sess. (March 14, 1978), reprinted in EEOC Legislative History at 519; 124 Cong. Rec. S4449 (daily ed., March 23, 1978) (remarks of Senator Williams), reprinted in EEOC Legislative History at 538.

Likewise, while some members of Congress suggested that a showing of business purposes or age-related cost factors should be required to entitle plans to the Section 4(f)(2) exemption, their remarks were not directed to the meaning of the 1978 amendment. Rather, they referred to the meaning of the section as originally enacted in 1967. See 123 Cong. Rec. 34295 (Oct. 19, 1977) (remarks of Senator Williams), reprinted in EEOC Legislative History at 482; 124

Cong. Rec. H 2269 (daily ed., March 21, 1978)(remarks by Rep. Hawkins), reprinted in EEOC Legislative History at 528; 124 Cong. Rec. H 2277 (daily ed. March 21, 1978)(remarks of Rep. Waxman), reprinted in EEOC Legislative History at 535; 124 Cong. Rec. S 4450 (daily ed. March 23, 1978)(remarks of Senator Javits), reprinted in EEOC Legislative History at 539. As this Court observed in McMann, such "[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history" of the original act. United Airlines Inc. v. McMann, 434 U.S. at 200 n.7. Nor are they a reliable "basis for inferring the meaning of a congressional enactment . . . because as time passes memories fade and a person's perception of his earlier intention may change."

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

Read as a whole, then, the legislative history adds nothing to the clear language of the amendment. Congress was concerned about mandatory retirement based on age and it amended section 4(f)(2) of the Act to expressly prohibit such provisions in otherwise bona fide benefit plans. It did not redefine or eliminate the subterfuge language, nor did it establish a new test for determining what benefit plan are bona fide. Accordingly, the Sixth Circuit's interpretation of the amendment must be rejected.

C. The Decision Below, If Upheld, Will Adversely Affect The Retirement Systems of Many States

If allowed to stand, the contrary decision of the court below will disrupt the retirement systems of almost every state in the country. Most of these retirement systems draw distinctions based on age and, while these systems all have valid public purposes, it is quite unlikely that these distinctions can satisfy the rigid age-related cost justification test adopted by the Sixth Circuit.

In addition to Ohio, at least ten states restrict disability retirement benefits to those disabled prior to regular retirement age. Employees disabled after regular retirement age are accorded regular retirement benefits.

See, e.g., Ala. Code § 36-27-16(b)(1); Haw. Rev. Stat. §§ 88-75, 88-76; Me. Rev. Stat. Ann. tit. 5, § 17904(1)(B); Md. Code Ann. art. 73B, § 11; Miss. Code Ann. § 25-11-113; N.H. Rev. Stat. Ann. § 100A:6; N.J. Rev. Stat. §§ 43:15A-42, 43:15A-43; Pa. Cons. Stat. Ann. tit. 71, § 5308(c); S.C. Code Ann. § 9-1-1560; Wash. Rev. Code Ann. §§ 41-40-210, 41-40-220; Wis. Stat. Ann. § 40.63(1).

Moreover, twenty-five states include other express age-related distinctions in establishing eligibility requirements for disability retirement benefits. Alaska Stat. §§ 14.25.130, 39-35-410; Ariz. Rev. Stat. Ann. § 38-781.31; Ark Stat. Ann. §24-3-208; Colo. Rev. Stat. § 24-51-701; Conn. Gen. Stat.

§ 5-169(a); Ga. Code Ann. § 44-2-123; Idaho Code § 59-1313(2)(b); Ill. Rev. Stat. § 14-123; Kan. Stat. Ann. §74-4927(a); Mass. Gen. L. ch. 32, §§ 6, 7; Mich. Comp. Laws Ann. §§ 38.22, 38.23; Minn. Stat. Ann. § 352.113; Mo. Rev. Stat. §§ 104.410, 104.515.3(5); Mont. Code Ann. § 19-3-1002; N.M. Stat. Ann. §§ 10-11-10(D), (E); N.Y. Retire. & Soc. Sec. Law §§ 62, 63; N.C. Gen. Stat. § 135-106; R.I. Pub. Laws §§ 36-10-12, 36-10-13, 36-10-14; S.D. Codified Laws Ann. §§ 3-12-98, 3-12-103; Tenn. Code Ann. §§ 8-36-501, 8-36-502: Tex. Code Ann. ch. 21, § 24.202; Utah Code Ann. §§ 460, 461: Vt. Stat. Ann. tit. 3, §§ 460, 461: Va. Code Ann. § 51-111.56; Wyo. Stat. § 9-3-422.

Only thirteen states make no age-based distinctions in dete.mining eligibility for disability retirement

benefit, or distinguish only on the basis of years of service. See, e.g., Cal. Code. tit. 2, art. 3, § 21021; Del. Code Ann. tit. 29, § 5524; Fla. Stat. § 121.091(4); Ind. Code § 5-10.2-4-6; Iowa Code § 97B-50; Ky. Rev. Stat. Ann. §§ 61.600, 61.605, 61.615(e); La. Rev. Stat. Ann. §§ 42:581, 42:702; Neb. Rev. Stat. §§ 84-1317; 84-1323.01; Nev. Rev. Stat. § 286.620; N.D. Cent. Code §§ 54-52-17(3)(d), (4)(e); Okla. Stat. tit. 74, § 915(B); Or. Rev. Stat. § 237.171(1);W. Va. Code § 5-10-25.

In **McMann** the Court said that it was not convinced that Congress had intended to "undermine the countless bona fide retirement plans existing in 1967 when the Act was passed" and that "[s]uch a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous

expression in the statute." Id. at 199. In response to the Court's admonition, Congress said in 1978 only that involuntary retirement should be unlawful. This Court should take Congress at its word and therefore reject the effort of the court below to add either a "substantial business purpose" or an "age-related cost justification" requirement to the statute. To do so would only disrupt many of the very plans that Congress intended to protect when it placed Section 4(f)(2) in the statute in the first place.

CONCLUSION

For the reasons set forth above, the Commonwealth of Pennsylvania respectfully requests that the decision below be reversed.

Respectfully submitted,

LeROY S. ZIMMERMAN
AttorneY General

SUSAN J. FORNEY
Senior Deputy Attorney General
(Counsel of Record)

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief Litigation Section

Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

(717) 783-1471

December 14, 1988

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE SUPPORTING APPELLANT

PAUL J. ONDRASIK, JR.
(Counsel of Record)
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Amicus

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a retirement program's denial of disability retirement benefits to employees age 60 and over (and provision instead of only early or regular retirement benefits) must be justified by age-related cost factors in order to qualify for protection under the "bona fide employee benefit plan" exemption of § 4(f)(2) of the Age Discrimination In Employment Act of 1967, 29 U.S.C. § 623(f)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
NEITHER THE LANGUAGE OF THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION IN § 4(f)(2) OF THE ADEA NOR ITS LEGISLATIVE HISTORY AND PURPOSE SUPPORT THE CONCLUSION THAT AGE-BASED VARIANCES IN EMPLOYEE BENEFITS MUST BE JUSTIFIED BY AGE-RELATED COST FACTORS	7
A. The Statutory Language Does Not Support An Age-Related Cost Justification Limitation On § 4(f)(2)	8
B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of The § 4(f)(2) Exemption	13
C. An Age-Related Cost Justification Limitation On § 4(f)(2) Does Not Serve The ADEA's Overall Purposes As Well As A Broader Exemption Would	20
1. The Legislative Purposes	20
2. A Broad Exemption Would Better Serve The ADEA's Purposes	22
D. Further Regulation Of Age Discrimination In Employee Benefit Plans Should Come Through Specific Study And Legislative Action From Congress	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 25
Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) 10
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 8
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 10, 11
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 9
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 8
Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982) 12
Desris v. City of Kenosha, 687 F.2d 1117 (7th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) 22
Donovan v. Anheuser-Busch, Inc., 666 F.2d 315 (8th Cir. 1981) 10
Dorsch v. L.B. Foster Co., 782 F.2d 1421 (7th Cir. 1986) 22
EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988) 12
EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988) 11
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) 12
EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) 12
EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) 10
Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) 9, 11
Germann v. Levy, 553 F. Supp. 700 (N.D. Ill. 1982) 11
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 11

TABLE OF AUTHORITIES—Continued

Page

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) 9
INS v. Phinpathya, 464 U.S. 183 (1984) 8
Patterson v. Independent School District # 709, 742 F.2d 465 (8th Cir. 1984) 12, 13
Perrin v. United States, 444 U.S. 37 (1979) 8
Potenze v. New York Shipping Ass'n, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987) 12
Shea v. Vialpando, 416 U.S. 251 (1974) 9
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 12
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) ..... *passim*
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 26

STATUTES AND REGULATIONS

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. 621(b) 21, 22
ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) ..... *passim*
ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) ..... *passim*
ADEA § 4(g), 29 U.S.C. § 623(g) 25
ADEA § (4)(i), 29 U.S.C. § 623(i) 25
Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* 9
ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) 25
42 U.S.C. § 2000e-14 (1966) (repealed) 13, 15
29 C.F.R. § 1625.10(2)(b) (1979) 10

LEGISLATIVE MATERIALS

S. 1103, 90th Cong., 1st Sess. (1967) 18
H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History Of The Age Discrimination in Employment Act of 1967* ("*EEOC Legislative History*"), at 74 ..... 19, 21

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 723, 90th Cong., 1st Sess. (1967), *reprinted in EEOC Legislative History*, at 105	19
Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (Aug. 1, 2, 3, 15, 16 and 17, 1967)	18, 19
Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (March 15-17, 1967)	15, 16, 17, 18
The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in EEOC Legislative History*, at 16	13, 14, 21, 22
Research Materials Accompanying the Secretary of Labor's Report (1965)	14
113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68	15
113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71	17, 21
113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72	17
113 Cong. Rec. 31253-31257 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 144-48	21
113 Cong. Rec. 31255 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 146	20, 21
113 Cong. Rec. 34740 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 151	21-22
113 Cong. Rec. 34745 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 156	20
113 Cong. Rec. 34750 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 161	20

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
Basic Patterns, Collective Bargaining Negotiations and Contracts (BNA) No. 1067 (Apr. 24, 1986)	24
Basic Patterns, Collective Bargaining Negotiations and Contracts (BNA) No. 1068 (May 8, 1986)	24
Fundamentals of Employee Benefit Programs (Employee Benefit Research Institute, 3d ed. 1987)	9, 24
M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* (1964)	10
M. Wermel & G. Beideman, *Employee Benefit Programs* (1957)	10
Retirement Before Age 65: Trends, Costs, and National Issues, U.S. General Accounting Office (July 1986)	24
Successful Employee Benefit Plans (Prentice-Hall, Inc. ed. 1952)	10
The Total Approach to Employee Benefits (A. Deric ed. 1967)	10
Websters II Riverside University Dictionary (1984)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE SUPPORTING APPELLANT

INTEREST OF THE AMICUS[1]

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of this country's private employer-sponsored employee benefit system. The over 400 members of the APPWP include many large and small plan sponsors, as well as plan support organizations, such as investment firms, banks, insurers, actuar-

[1] Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.

ial firms, and other professional benefit organizations. Collectively, the APPWP's members have substantial experience in the design and administration of benefit plans of all types, including retirement plans—like the one at issue here—that limit eligibility for disability benefits to those (younger) persons who are ineligible for regular or early retirement benefits. Thus, the resolution of the issue presented in this case—involving whether a retirement program's denial of disability retirement benefits (but not early or regular retirement benefits) to employees age 60 and over must be justified by age-related cost factors in order to qualify for protection under § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(f)(2)—is of significant interest to APPWP and its members.

STATEMENT

The Public Employees Retirement System of Ohio ("PERS") entitles public employees who satisfy certain eligibility conditions to receive monthly retirement benefits upon the termination of their employment. J.S. App. A3, A9. A regular retirement pension is available to any employee who has attained the age of 70; an early retirement pension is available to any employee who is age 60 or over and has five or more years of service. J.S. App. A31-A32. A disability retirement pension is available to any employee who has at least five years of credited service and has become physically unable to perform the requirements of her job. J.S. App. A3, A9. An employee is ineligible for the disability retirement pension, however, if she is age 60 or over, or is receiving another disability retirement benefit from any Ohio state or municipal program. J.S. App. A9. The statutory age limitation on receipt of disability retirement benefits under PERS has existed since 1933. J.S. App. A3. In 1976, Ohio amended the statute to provide that the disability pension would equal or exceed 30% of an employee's final average salary. J.S. App. A24.

In June 1985, June Betts, a 61-year-old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCBMRDD"), became disabled and could no longer perform her work-related duties. J.S. App. A21, A23. HCBMRDD advised Betts that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts applied to PERS for the more valuable disability retirement benefits,[2] but PERS told her that she was ineligible for those benefits because of her age. *Ibid.* Betts then elected both to receive early retirement benefits (plus health benefits) and to file suit under the ADEA, claiming that the State had compelled her to retire by denying her disability retirement benefits. *Ibid.*

On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," it found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated in the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, HCBMRDD and PERS had constructively discharged, and thus involuntarily retired, her in

---

[2] Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, equalled only $158.50 per month. J.S. App. A24.

violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

A divided panel of the Sixth Circuit affirmed. J.S. App. A2-A19. It began by noting that, under § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." *Id.* at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exception in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to "agree" with the district court that " 'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors' " (*ibid.* (citation omitted)).

Citing federal regulations and two courts of appeals' decisions, the court explained that "[u]nder the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." J.S. App. A5. It then found that the plan could not be justified by any such business purpose because, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification." J.S. App. A6. Thus, without addressing the district court's constructive discharge and involuntary retirement findings, the court of appeals affirmed.

SUMMARY OF ARGUMENT

The court below held that, in order to qualify for the exemption of § 4(f)(2) of the ADEA, an age-based variance in employee benefits must be justified by age-related cost considerations. In so holding, the court concluded (1) that, in amending the ADEA in 1978 to prohibit involuntary retirements, Congress repudiated this Court's decision in *McMann* that an employee benefit plan that predates the ADEA cannot be a "subterfuge" to evade the statute's purposes and (2) that therefore only benefit variances justified by age-related costs are protected by § 4(f)(2). The APPWP does not purport to address, and leaves to the Appellant and its other *amici* the task of explaining, how the 1978 amendment affects the *McMann* decision and the age-related cost justification theory. Rather, the APPWP addresses here only Congress' original intent, and the purposes it sought to achieve, in enacting the § 4(f)(2) exemption.

The age-related cost justification limitation which the court below imposed on § 4(f)(2) of the ADEA is without support in either the plain language or the legislative history and purpose of the statute. By its terms, § 4(f)(2) broadly exempts from the ADEA's proscriptions "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the statute's purposes." 29 U.S.C. § 623(f)(2). It thus shields any and all ongoing administrative programs for the provision of non-wage and non-salary compensation that are not designed to accomplish discrimination in the terms and conditions of employment or in compensation not conferred through an employee benefit plan.

Neither the "such as" phrase that modifies "any bona fide employee benefit plan" nor the "subterfuge" phrase suggests, much less compels, a different conclusion. The former merely denotes examples of employee benefit

plans that § 4(f)(2) protects. The latter, by requiring inquiry into the employer's subjective intent, ensures that employers cannot design and use benefit plans to engage in otherwise prohibited acts of discrimination against older workers.

Nothing in the ADEA's legislative history permits a more restrictive reading of § 4(f)(2). That history demonstrates that, in enacting the ADEA, Congress was principally concerned with promoting employment of older workers and with eliminating "arbitrary" age discrimination. Although Congress recognized that "institutional barriers," including employee benefit plans, were among the causes of unemployment of older workers, it declined to equate these institutional barriers with "arbitrary" age discrimination and, moreover, determined that disruption of employee benefit plans would only exacerbate the unemployment problem. It thus enacted the broad exemption for employee benefit plans that Senator Javits proposed—instead of the narrower one proposed by Senator Smathers that would have limited the exemption to plans with age-related cost justifications—to encourage the hiring of older workers by not disrupting the employee benefit system. Congress did so recognizing that the age-related cost of providing employee benefits was only one of several plan-related causes of the unemployment problem and, furthermore, that the language it used would apply to many plans which lacked such age-related cost justifications.

The age-related cost justification limitation on § 4(f)(2) simply would not advance the statute's overall purposes as well as a broader exemption would. In enacting the ADEA, Congress was concerned with: (1) "arbitrary" discrimination aimed at involuntary limiting employment of older workers; (2) "institutional barriers" that operated to deter employment of older workers; and (3) encouraging employers, employees and unions to develop solutions to the special needs of older workers.

While the age-related cost justification theory responds in part to the first of these concerns when plans are claimed to cause the termination of older workers, it is entirely insensitive to the latter concerns. It treats the age-related costs of providing employee benefits as the sole "institutional barrier" to the employment of older workers, despite Congress' recognition that other plan-related barriers exist. And the age-related cost justification limitation is insensitive to the special problems arising from the impact of age on employment. Its adoption would, therefore, undermine the purposes of § 4(f)(2) by disrupting well-established employee benefit plans—many of which contain no age-related cost factors—and by making plan design and benefit negotiations inflexible and unresponsive to the special needs of older workers. Such results disregard the very concerns that motivated Congress to enact § 4(f)(2) in 1967.

ARGUMENT

NEITHER THE LANGUAGE OF THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION IN § 4(f)(2) OF THE ADEA NOR ITS LEGISLATIVE HISTORY AND PURPOSE SUPPORT THE CONCLUSION THAT AGE-BASED VARIANCES IN EMPLOYEE BENEFITS MUST BE JUSTIFIED BY AGE-RELATED COST FACTORS

The court below held that the State of Ohio's retirement program, which denies disability retirement benefits to workers age 60 and over, does not qualify for protection under § 4(f)(2) of the ADEA because its age-based variance in employee benefits was not justified by age-related cost considerations. In so holding, the court ruled either that § 4(f)(2) applies only to those types of "plans" where the cost of providing a benefit varies according to age, or that an age-based differential in benefits is a "subterfuge" to evade the purposes of the ADEA unless the differentiation is specifically attributable to age-related costs. But neither conclusion—both of which

engraft an age-related cost justification limitation onto § 4(f)(2)—can be squared with the language, legislative history, or purposes of the ADEA.

A. The Statutory Language Does Not Support An Age-Related Cost Justification Limitation On § 4(f)(2)

This Court has often stated that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also INS v. Phinpathya*, 464 U.S. 183, 189 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The language of the ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). But § 4(f)(2) of the statute qualifies § 4(a)(1)'s prohibition, making it entirely lawful for an employer "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. § 623(f)(2).[3] The "ordinary, contemporary, common meaning" (*Perrin v. United States*, 444 U.S. 37, 42 (1979)) of these words requires the conclusion that § 4(f)(2) protects all ongoing administrative programs that provide non-wage compensation—even those without age-related cost justifications—that were not conceived to accomplish discrimination in terms or conditions of employment or in compensation not conferred by employee benefit plans.

---

[3] In 1978, Congress amended § 4(f)(2) to add a proviso which states that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual[.]" 29 U.S.C. § 623(f)(2). The effect of this amendment on the exemption is discussed briefly *infra* at n.5, and more extensively in the briefs of Appellant and the Commonwealth of Pennsylvania as *amicus curiae*.

By its terms, § 4(f)(2) applies to "any bona fide employee benefit plan." 29 U.S.C. § 623(f)(2). The term "any" signifies that Congress intended the exemption to be comprehensive in scope. *See, e.g., Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974). The phrase "bona fide" means only that a plan must be authentic—that is, it must "'exist[] and pay[] benefits.'" *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977) (citation omitted). The phrase "employee benefit" refers to "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer." *Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987); *see also Websters II-Riverside University Dictionary* 115 (1984). Finally, the term "plan" refers to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898; *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217-219 (1987) (defining term "plan" in Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*). Thus, when viewed in terms of its ordinary meaning, the language of § 4(f)(2) exempts every ongoing administrative program that provides non-wage compensation to employees, provided that the program is not a "subterfuge" to evade the purposes of the ADEA.[4]

---

[4] This interpretation draws support from the meaning given to the phrase "employee benefit plan" in the industrial relations practice that pre-existed the ADEA's enactment in 1967 and that continues to exist today. *Cf. California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604 (1980) (interpreting the term "seniority system" in Title VII by reference to industrial relations practice and traditional labor policy). In that practice, the phrase "employee benefit plan" was and is understood to refer to a broad range of plans, including, *inter alia*, short- and long-term disability benefit plans, disability retirement plans, insurance plans, disability insurance plans, pension plans, profit-sharing plans, savings plans, scholarship plans, stock purchase plans, termination incentive and severance

That Congress modified the phrase "any bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan" does not, as some courts have suggested, provide support for an age-related cost justification limitation on § 4(f)(2)'s plain meaning. *See, e.g., EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). When Congress enacted the ADEA, many retirement, pension, or insurance plans—such as defined contribution pension plans, profit-sharing retirement plans, and some disability retirement plans—did not have age-related cost justifications. The age-related cost-justification limitation, therefore, cannot be derived from the "types" of plans listed in the "such as" phrase. *Accord Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) (profit-sharing retirement plan). Moreover, the "such as" phrase merely provides examples of the plans included in the phrase "any bona fide employee benefit plan." It does not purport to define or qualify that phrase, as an age-related cost justification limitation would do. *See id.* at 215; *see generally Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981). Finally, the "such as" phrase purports only to illustrate the kinds of "plans" that § 4(f)(2) covers, and the concept of a *plan* does not in any sense relate to the variables affecting the cost of providing

---

allowace plans, and certain vacation, sick leave, and holiday plans. *See The Total Approach to Employee Benefits* 83-124, 506 (A. Deric ed. 1967); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 13, 20-23, 103-110 (1964); M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-21 (1957); *Successful Employee Benefit Plans* 74-91 (Prentice-Hall, Inc. ed. 1952). *Accord* 29 C.F.R. § 1625.10(2)(b) (1979) ("[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits'").

particular *benefits*. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d at 216-217; *see generally Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-219 (discussing significance of distinction between statutory terms "plans" and "benefits").

Nor does the "subterfuge" language provide a basis for engrafting an age-related cost justification limitation onto § 4(f)(2). "In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. The "subterfuge" language thus refers to a specific "intent . . . to evade a statutory requirement," and is inconsistent with any "*per se* rule requiring an employer to show an economic or business purpose" in order to qualify for the § 4(f)(2) exemption. *Ibid.* A *per se* age-related cost justification limitation is even more at odds with the "subterfuge" language than is a *per se* economic or business purpose requirement: by making the "subterfuge" inquiry turn on a particular kind of objective proof, as the decision below apparently does, it essentially removes the illicit subjective intent requirement from the statute. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The "subterfuge" language cannot properly be interpreted in this fashion. *Accord EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1494-1495 (3d Cir. 1988) (Hutchinson, J., concurring); *Germann v. Levy*, 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982).[5]

---

[5] The court below suggested that, in amending the ADEA in 1978, Congress overruled the *McMann* Court's interpretation of the "subterfuge" clause. J.S. App. A4. But Congress did not modify or redefine the "subterfuge" language in response to *McMann*; it simply amended the statute to prohibit involuntary retirement. Moreover, as both Appellant and the Commonwealth of Pennsylvania as *amicus curiae* explain (App. Br. ——; Penn. Br. ——), while the legislative history indicates that Congress disagreed with the *McMann* decision, its focus was entirely on the lawfulness of involuntary retirement provisions—and not on the application of the

This is not to say that all benefit programs that vary non-payroll compensation items on the basis of age—including those without age-related cost justifications—are necessarily lawful under the ADEA. The "subterfuge" language plainly precludes such a result: it denies protection to those plans which an employer has designed and used specifically to discriminate against older workers with respect to either their terms and conditions of employment or their compensation that is not conferred through an employee benefit plan. *See United Air Lines, Inc. v. McMann*, 434 U.S. at 207 (White, J., concurring); *Patterson v. Independent School District #709*, 742 F.2d 465, 466 (8th Cir. 1984). Thus, the exemption would not protect a plan that an employer specifically designed to force the involuntary retirement of older persons. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-125 (1985). Nor would the exemption protect a plan that an employer specifically conceived to continue what previously had been a discriminatory payroll practice. *Cf. EEOC v. Home Insurance Co.*, 672 F.2d 252, 257-263 (2d Cir. 1982). But where there is no proof of an intent to evade a statutory prohibition—as, for example, where a challenged benefit provision pre-dates the ADEA's enactment (*see United Air Lines, Inc. v. McMann*, 434 U.S. at 203); where an age-based benefit distinction has an economic or business purpose (*see, e.g., Potenze v. New York Shipping Ass'n*, 804 F.2d 235, 238-239 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987); *Crosland v. Charlotte Eye, Ear & Throat Hosp.*, 686 F.2d 208, 212-216 (4th Cir. 1982); or where a voluntary incentive plan provides em-

"subterfuge" clause to other plan provisions. In these circumstances, Congress cannot be deemed to have overruled the *McMann* majority's interpretation of the "subterfuge" clause. *Accord EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988). And, even if Congress can be deemed to have overruled this aspect of the *McMann* decision, there is still no basis for importing an age-related cost justification limitation into the "subterfuge" inquiry.

ployees options that they are free to reject (*see, e.g., Patterson v. Independent School District #709*, 742 F.2d 465)—the variance in benefits under the plan would constitute nothing more than the discrimination that § 4(f)(2) expressly permits.

B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of The § 4(f)(2) Exemption

The conclusion that § 4(f)(2) protects all ongoing administrative programs that vary benefits on the basis of age and are not a subterfuge to evade the ADEA's purposes—regardless of whether they reflect age-related cost justifications—is fully supported by the statute's legislative history. The contrary suggestion of the court below is unfounded.

The ADEA's legislative history demonstrates that promoting the employment of older workers was Congress' principal concern when it enacted the statute in 1967. In 1964, when it first began to consider the age discrimination problem, Congress ordered the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age" and to make recommendations to Congress for legislation to prevent "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (repealed). The Secretary of Labor did so. *See The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) ("*Secretary's Report*"), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 16-41 (1981) ("*EEOC Legislative History*"). His June 1965 Report found that "not all discrimination in this area is 'arbitrary'"; that age discrimination (unlike other forms of discrimination) is rarely based on a mere dislike for older workers; and that age discrimination is principally based on (a) unfounded assumptions about the effect of age on ability to perform, (b) valid conclusions

about the effect of age on ability to do a job, and (c) institutional arrangements—such as pension, seniority, insurance, and promotion-from-within policies—that, although often designed to protect or support older workers, may have an adverse impact on their employment. *EEOC Legislative History* at 19-20. Importantly, the Report made clear that only decisions based on unfounded assumptions about the effect of age on ability constitute "arbitrary age discrimination." *Id.* at 20. The Report added that, in isolated circumstances, employers could use institutional arrangements arbitrarily to restrict the employment opportunities of older workers. *Id.* at 22.

While the Report characterized employee benefit plans as "institutional arrangements" which might adversely affect the employment of older workers (*EEOC Legislative History*, at 33), it also stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Ibid.* The Report found that "cost considerations do not . . . always operate against the older worker," that "[r]elatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons," and that, "[e]ven in cases where [employers] mentioned pension and insurance [plans as a barrier to employment], cost was not the principal factor involved." *Ibid.*[6] Rather, the Report noted that employers cited limited work expectancy of older workers, morale issues associated with employing persons who would not qualify for employee benefits, and presumed inability to pass physical examinations as the principal employee benefit

[6] The *Research Materials Accompanying The Secretary of Labor's Report* 10 (1965) indicated that, of the employers surveyed, only 6.7% cited the costs and provisions of pension plans as a reason for excluding older workers; only 1.4% cited the costs and provisions of health insurance as a reason; and only 1.2% cited the costs and provisions of life insurance as a factor.

plan-related barriers to the employment of older workers. *Id.* at 33-34.

In 1966, Congress directed the Secretary of Labor to submit specific legislative proposals to implement the recommendations in his Report. *See* 42 U.S.C. § 2000e-14 (1966) (repealed). On January 23, 1967, Secretary of Labor Willard Wirtz submitted a draft "Age Discrimination in Employment Act of 1967" to Congress, stating that the draft bill's "prohibitions are designed to bar arbitrary age discrimination" and that, with respect to so-called "institutional arrangements," the bill authorized research aimed at "reducing barriers to the employment of older workers." *Id.* at 62-63. Section 4(f) of the bill, however, provided that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> • • • •
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

The Administration bill, which Senator Yarborough introduced on February 3, 1967 (*EEOC Legislative History*, at 66), drew criticism from several legislators during the Senate Hearings. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. (March 15-17, 1967) ("*Senate Hearings*"). On the first day of these hearings, Senator Javits protested that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treat-

> ment under pension plans a condition of that employment.

Senate Hearings, at 27. Senator Javits announced that he would therefore soon propose an amendment to the Administration bill that would grant employers "a degree of flexibility" with respect to employee benefit plans. *Id.* In his view, a "fairly broad exemption . . . for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of the Administration bill, similarly noted a "deficiency" in the bill. *Senate Hearings*, at 29. Reading the Administration bill as requiring employers to provide older workers "the same private pension rights and other fringe benefits" that they provide to younger workers (*id.* at 29), he argued that such a requirement would impose unwarranted costs on employers and actually induce them to discriminate against older workers in the hiring process. *Id.* at 29-30. He therefore proposed an amendment that would have permitted employers to vary coverage under benefit plans "where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees." *Id.* at 30.[7]

Faced with these criticisms, Secretary Wirtz defended the Administration's bill by emphasizing that its "pro-

[7] Senator Murphy, however, answered that only a small percentage of employers cited the cost of providing pension and insurance benefits as a reason for age discrimination in employment, and that a Bureau of Labor Statistics ("BLS") report showed both that the costs of health and insurance plans do not vary greatly with age and that pension and insurance costs of hiring older workers are often overstated. *Senate Hearings*, at 34. Senator Murphy thus urged the committee to reconsider a bill that he and Senator Javits had introduced in 1966. *Id.* at 32.

hibition is of 'discrimination' in the sense of '*arbitrary* age discrimination' "—a prohibition which he believed that the "obviously broad" terms of § 4(f) reflected. *Senate Hearings*, at 39 (emphasis in original). He stated that § 4(a)'s prohibition on age discrimination "reflects simply the significant fact that what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies, a degree of protection against discrimination on the basis of age. . . ." *Id.* at 43. While he noted that "[w]hether different eligibility requirements or benefit levels for older workers would constitute arbitrary age discrimination . . . would require determination under the facts of each case" (*id.* at 47), he later added that "the effect of the provision in section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about." *Id.* at 53.

Apparently unpersuaded by Secretary Wirtz's assurances, Senator Javits, the next day on the Senate floor, proposed to replace § 4(f)(2) of the Administration bill with an amendment making it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual[.]

113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72. He did so because, in his view, "the age discrimination law is not the proper place to fight this particular battle." 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. Indeed, he noted that he had "recently introduced a comprehensive bill to deal with this problem." *Id.* Significantly, the bill to which he referred—a precursor to ERISA—defined the phrase "employee benefit plan" to include:

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness benefits, or accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967).[8]

The hearings in the House evidence a clear understanding of the Senate subcommittee's deliberations. *See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 90th Cong., 1st Sess. (August 1, 2, 3, 15, 16 and 17, 1967) ("*House Hearings*"). Secretary Wirtz admitted to the House subcommittee that the Senate sub-

[8] When the hearings resumed, representatives of the business community joined with Senator Javits in urging the committee to adopt a broader exception for bona fide employee benefit plans than the Administration bill provided. Like Senator Javits, Towers, Perrin, Forster & Crosby, Inc., a leading employee benefits consulting firm, recommended that the Administration bill be amended to exempt "any other bona fide employee benefit plan" from the statute's operation, stating that, "[i]n the absence of such exclusions, . . . hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)[.]" *Senate Hearings*, at 280. The American Life Convention, the Health Insurance Association of America, and the Life Insurance Association of America similarly expressed concern that the Administration's bill would disrupt many established insurance, welfare, pension, and other employee benefit plans. *Id.* at 296.

committee had amended § 4(f)(2) of the Administration's bill to clarify its intended scope. *Id.* at 39-40. Numerous witnesses urged the House subcommittee to do the same, reiterating the concerns expressed in the Senate that the Administration's bill would disrupt existing plans and discourage the hiring of older workers. *See id.* at 63, 68-70, 413, 418, 480-481, 495-496, 496-497, 499-500. Thus, the Chairman of the House Subcommittee concluded that, if adopted, the amended § 4(f)(2) would "relieve[] [employers] of the responsibility for the health and welfare and fringe benefits to employees" covered by the bill. *Id.* at 68 (remarks of Rep. Dent).

On October 23, 1967, after the conclusion of these hearings, the House Committee on Education and Labor favorably reported an age discrimination bill (H.R. 13054) to the whole House. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77. The bill so reported included language like that Senator Javits had proposed in the Senate and was essentially identical to that ultimately enacted. *See id.* at 94. In discussing the amended § 4(f)(2), the House Committee report stated:

> It is important to note that exception [2] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, *supra*, *reprinted in EEOC Legislative History*, at 77. Twelve days later, the same bill was reported favorably to the Senate, with a Senate committee report to the same effect. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in*

EEOC Legislative History, at 108.[9] Congress then passed the bill, and the President signed it into law.

This legislative history confirms that, in enacting the ADEA, Congress was principally concerned with promoting the employment of older workers. To address this broad concern, Congress expressly declined to adopt either Senator Smathers' proposal to limit the § 4(f)(2) exemption to benefit variances justified by age-related costs or the Administration's proposal to assess benefit variances on a case-by-case basis. Congress opted instead for a broader exemption—one granting employers "a degree of flexibility" with respect to employee benefit plans so as to "facilitate hiring rather than deter it and [to] make it possible for older workers to be employed without the necessity of disrupting those systems." *Senate Hearings*, at 27-28. The court below simply misreads the legislative history in deriving an age-related cost justification limitation from it.

C. An Age-Related Cost Justification Limitation On § 4(f)(2) Does Not Serve The ADEA's Overall Purposes As Well As A Broader Exemption Would

The decision below is statutorily unreasonable for yet another reason. Its narrow interpretation of § 4(f)(2)—limiting that exemption to age-cost justified benefit variances—does not serve the ADEA's purposes as well as a broader exemption would serve them.

1. *The Legislative Purposes*

The ADEA specifically states that its purposes are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. § 621(b)). The language and legislative history of the ADEA make clear that Congress had three levels of concerns.

[9] The floor debates in the Senate and House indicate that both bodies understood that, as amended, § 4(f)(2) would broadly exempt ongoing programs for the provision of non-wage benefits. *See, e.g.*, 113 Cong. Rec. 31255 (colloquy between Sen. Javits and Sen. Yarborough), *reprinted in EEOC Legislative History*, at 146; 113 Cong. Rec. 34750 (remarks of Rep. Randall), *reprinted in EEOC Legislative History*, at 161; 113 Cong. Rec. 34745 (remarks of Rep. Smith), *reprinted in EEOC Legislative History*, at 156.

First, Congress intended to promote decision making based on true facts, rather than false stereotypes, about age and its effects. Congress was concerned that employers had misunderstood the relationship between age and employability and, accordingly, had failed to hire or had discharged older persons who were in fact qualified for employment. Congress considered such decision making—based on unfounded assumptions about age—to constitute "arbitrary" age discrimination in employment. The ADEA's principal aim was to eliminate such "arbitrary" age discrimination. *See, e.g., Secretary's Report*, at 6-17, *reprinted in EEOC Legislative History*, at 23-34; 113 Cong. Rec. 7076 (March 16, 1967) (remarks of Sen. Javits), *reprinted in EEOC Legislative History*, at 71; 113 Cong. Rec. 31253-31257 (Nov. 6, 1967) (remarks of Sens. Yarborough and Javits), *reprinted in EEOC Legislative History*, at 144-48.

Second, Congress intended to reduce the "institutional barriers" to the employment of older workers. Congress recognized that employers often denied employment opportunities to older persons because of structural concerns—including concerns related to employee benefit plans. Congress concluded that the employment problems relating to these institutional barriers would be reduced if, among other things, it generally exempted employee benefit plans from the prohibitions of the statute and prohibited their disruption. Section 4(f)(2), as amended, was supposed to accomplish these results. *See, e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77; 113 Cong. Rec. 31255 (Nov. 6, 1967) (remarks of Sens. Javits and Yarborough), *reprinted in EEOC Legislative History*, at 146; 113 Cong.

Rec. 34740 (Dec. 4, 1967) (remarks of Rep. Perkins), *reprinted in EEOC Legislative History*, at 151.[10]

Third, Congress intended to encourage employers, employees, unions and government to work together to develop programs to facilitate the employment of older persons and to meet their special needs. Congress recognized that, in contrast to persons of different races, older and younger workers have different qualifications and face different pre- and post-employment problems. *See generally Secretary's Report*, at 11-17, *reprinted in EEOC Legislative History*, at 28-34. Thus, Congress concluded that employers and employees (or their unions) should have the flexibility to develop solutions to these different problems and to implement programs tailored to the special needs of older and younger workers. Congress intended both § 4(a) and § 4(f) to be interpreted with these concerns in mind. *See* 29 U.S.C. §§ 621(b), 623(a)(1); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-29 (7th Cir. 1986); *Desris v. City of Kenosha*, 687 F.2d 1117, 1121 (7th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

2. *A Broad Exemption Would Better Serve The ADEA's Purposes*

Rejecting the age-related cost justification theory and interpreting § 4(f)(2) to exempt all ongoing administrative programs for the provision of non-wage compensation which are not specifically designed as a "subterfuge" to evade the ADEA would better promote the ADEA's purposes. Specifically, a broad exemption would fully main-

[10] Congress was likewise cognizant of the pernicious effects of disrupting existing benefit programs when it amended § 4(f)(2) of the ADEA in 1978 to prohibit involuntary retirements. Recognizing that some involuntary retirement terms in existing plans had resulted from good faith negotiations between management and unions, Congress chose to delay the amendment's effective date for such terms in collectively bargained plans or agreements. *See EEOC Legislative History*, at 375, 519.

tain the ADEA's prohibition against "arbitrary" age discrimination, would be sensitive to the problem of "institutional barriers" to the employment of older workers, and would provide a flexible vehicle for addressing the impact of age on employment.

First, a broad employee benefit plan exemption maintains in full force the ADEA's prohibition against "arbitrary" discrimination based on unfounded assumptions concerning the effect of age on ability. Such a broad exemption would relate only to the provision of benefits to employees; it would not in any way address or excuse discrimination in wages, terms and conditions of employment, or any other aspect of performance. To the contrary, as discussed earlier, the exemption would not apply to discrimination in compensation not conferred through an employee benefit plan—i.e., wages and other payroll practices—and the "subterfuge" clause would still prevent employers from using an employee benefit plan to circumvent the prohibition against arbitrary age discrimination in employment.

Second, a broad exemption would be fully responsive to the "institutional barriers" that Congress found led employers to deny employment to older workers. To the extent that the cost of benefits is an issue, the exemption would allow employers to make their own judgments—subject, of course, to competitive, collective bargaining, and other legal rules—concerning the costs that are appropriate to bear. To the extent that limited work expectancy is an issue, the exemption would allow employers to make their own judgments—subject to the same pressures stated above—concerning whether and in what circumstances limited work expectancy is a sufficient basis for limiting or adjusting the conditions under which older persons receive the benefits of particular employee benefit plans. And to the extent that employee morale or inability to pass physical examinations are issues, the exemption would leave employers with free-

dom to develop benefit packages that respond to and reduce such problems, subject to the prohibition against using an employee benefit plan as a "subterfuge" for excluding older persons from the workforce.

Finally, a broad exemption would leave employers, employees, and unions free to devise responsive solutions to the special problems arising from the impact of age on employment. It would allow employers to provide different plans, or a combination of plans, for different employee groups, thus recognizing that younger and older workers generally have different benefit needs.[11] The age-related cost justification theory, on the other hand, would prevent employers from creating such responsive benefit arrangements and, concomitantly, would disrupt many of the arrangements that currently exist; *indeed, the majority of retirement plans—like the plan at issue here—apparently limit eligibility for disability benefits to those (younger) employees who are ineligible for regular or early retirement benefits. See Basic Patterns, Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:2 (May 8, 1986) ("majority [of disability pension clauses] . . . state that an employee must be under normal or early retirement age" to be eligible for disability pension benefits); *see generally Retirement Before Age 65: Trends, Costs, and National Issues*, U.S. General Accounting Office (July 1986), at 29-31. Finally, a broad exemption would ensure that funds expressly designated for older workers are safeguarded and preserved for

[11] Younger workers are typically more concerned with benefits associated with consumption, training, and family; older workers are typically more concerned with savings, security, and continued income flow. *See generally Fundamentals of Employee Benefit Programs, supra*, at 10-11, 273-280. Accordingly, employers have, for example, traditionally provided greater severance benefits to younger workers, and greater pension benefits to older workers, upon termination of employment. *See Basic Patterns, Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:4 (May 8, 1986) and No. 1067, at 53:4 (April 24, 1986).

their benefit; it would allow and encourage the "integration" practices that ERISA authorizes and that enable employers to pay benefits without draining previously set-aside funds. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514 (1981).

D. Further Regulation Of Age Discrimination In Employee Benefit Plans Should Come Through Specific Study And Legislative Action From Congress

In suggesting that only a broad exemption—and not the narrow one adopted by the court below—gives full effect to Congress' intent and purposes in enacting § 4(f)(2) of the ADEA in 1967, APPWP does not mean to suggest that the ADEA, as originally enacted, provided a complete solution to the problem of age discrimination in employment. On the contrary, in 1967, Congress recognized that it was taking only a partial step and that further steps might be necessary; indeed, since 1967, Congress has amended the ADEA on several occasions precisely to address particular problems of age discrimination in employment, including problems of age discrimination in employee benefit plans.[12] On each occasion, however, Congress has acted only after careful study and debate, and only after determining which agency of government is best charged with enforcing a new prohibition.

[12] In the 1978 amendment to the ADEA, for example, Congress prohibited employers from using employee benefit plans involuntarily to retire employees because of their age. 29 U.S.C. § 623(f)(2). Furthermore, in the 1982 amendment to the ADEA, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and over as are offered to employees under age 65. 29 U.S.C. § 623(g). And, in the 1986 amendment to the ADEA, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. § 623(i).

Congress has also made ERISA responsive to similar issues. Thus, for example, that statute prohibits employers from excluding employees from pension plans merely because they have attained a certain age. *See* 29 U.S.C. § 1052(a)(2).

Were Congress now to engage in additional study, it might find that age-related costs are a more significant exclusionary factor in the international economy of the 1980s than they were in the economy of the 1960s, and that the exclusionary factors of concern in the 1960s are less significant today. Congress might also find that, to respond effectively to any changes in the forces resulting in the exclusion of older persons from employment, new age discrimination prohibitions with new exceptions are necessary. But Congress has not made any such studies, engaged in any such debates, or made any such findings. Rather, it has retained the broad exemption that it enacted in § 4(f)(2).

Until Congress chooses to amend the statute, the Court should enforce the § 4(f)(2) exemption in the manner that Congress originally and clearly intended. As Justice Frankfurter aptly stated in another context (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring)):

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did [here], to . . . find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between [the Judiciary] and Congress.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

PAUL J. ONDRASIK, JR.
(Counsel of Record)
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Amicus

December 1988

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

In the Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
APPELLANT

v.

JUNE M. BETTS

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING APPELLEE

WILLIAM C. BRYSON
Acting Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

HARRY F. TEPKER, JR.
Attorney

Equal Employment
Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether an employee benefit plan that bars employees who become disabled after age 60 from receiving disability benefits is sheltered from liability under the Age Discrimination in Employment Act by Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), which allows employers to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act, where the employer has not shown that the discrimination is justified by economic considerations.

TABLE OF CONTENTS

	Page
Interest of the Equal Employment Opportunity Commission . .	1
Statement	2
Summary of argument	4
Argument:	
Ohio's Public Employees Retirement System violated the Age Discrimination in Employment Act by disqualifying Betts from receiving disability benefits solely on account of her age since it proved no economic justification for its discriminatory treatment	6
A. The Public Employees Retirement System discriminated against Betts by denying her disability benefits	6
B. The EEOC's regulations properly interpret Section 4(f)(2) to shelter provisions in employee benefit plans reducing the amount of benefits paid to older employees only where economic considerations justify such treatment	7
C. Because Ohio's Public Employees Retirement System has offered no economic justification for its refusal to pay disability benefits to employees over age 59, its discrimination against older employees is not shielded by Section 4(f)(2)	21
D. Appellant errs in contending that Section 4(f)(2) authorizes arbitrary discrimination against older employees under employee benefit plans and that its plan is exempt as a pre-ADEA plan	23
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Cipriano v. *Board of Education*, 785 F.2d 51 (2d Cir. 1986)	5, 13, 22
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) . . .	4, 11
EEOC v. *Cargill*, 855 F.2d 682 (10th Cir. 1988)	26

Cases – Continued:

	Page
EEOC v. *City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988)	5, 8, 12
EEOC v. *County of Orange*, 837 F.2d 420 (9th Cir. 1988)	26
EEOC v. *Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982)	26
EEOC v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.), cert. denied, 469 U.S. 820 (1984)	4, 10, 11, 24
Hishon v. *King & Spalding*, 467 U.S. 69 (1984)	25
Karlen v. *City Colleges of Chicago*, 837 F.2d 314 (7th Cir.), cert. denied, No. 87-1831 (June 6, 1988)	3-4, 13, 22, 25
Lehman v. *Nakshian*, 453 U.S. 156 (1980)	2
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	8
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	12
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985)	25
United Air Lines, Inc. v. *McMann*, 434 U.S. 192 (1977)	14, 19, 20, 26
Western Air Lines v. *Criswell*, 472 U.S. 400 (1985)	9

Statutes and regulations:

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*	1
§ 1(b), 29 U.S.C. 621(b)	2, 24
§ 4(a)(1), 29 U.S.C. 623(a)(1)	2, 4, 6, 24
§ 4(f)(2), 29 U.S.C. 623(f)(2)	*passim*
§ 7, 29 U.S.C. 626	1
§ 11(b), 29 U.S.C. 630(b)	1
§ 11(b)(2), 29 U.S.C. 630(b)(2)	26
§ 15, 29 U.S.C. 633a	2
Pub. L. No. 93-259, § 28(a)(2)	26
Pub. L. No. 95-256, § 2(a), 92 Stat. 189	14, 19
29 U.S.C. 1002(34)	18
29 U.S.C. 1002(35)	18
29 U.S.C. 1053	18

Statutes and regulations – Continued:

	Page
Ohio Rev. Code Ann. (Anderson 1982 & Supp. 1987):	
§ 145.35	6, 21
§ 145.36	2, 22
Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978)	9
29 C.F.R. (1969):	
Section 860.110(a)	19
Section 860.120(a)	8
Section 860.120(a)(1)	3
Section 860.120(b)	4, 8, 11
29 C.F.R. (1988):	
Section 1625.10	1
Section 1625.10(a)(1)	3, 4, 9
Section 1625.10(d)	12
Section 1625.10(f)(1)(ii)	23

Miscellaneous:

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967)	15, 16, 19
113 Cong. Rec. (1967):	5, 10, 16, 17, 19, 21
p. 7076	17
p. 7077	16
pp. 31,254-31,255	5, 16
p. 31,255	10, 17, 19, 21
p. 34,746	17
124 Cong. Rec. (1978)	20
34 Fed. Reg. 9709 (1969)	4, 8, 11, 19
43 Fed. Reg. 43,266 (1978)	23
H.R. Conf. No. Rep. 950, 95th Cong., 2d Sess. (1978)	17, 26
H.R. Rep. No. 256, 95th Cong., 2d Sess. (1978)	
H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967)	17, 26-27
Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964, *The Older American Worker: Age Discrimination in Employment* (1965)	15

Miscellaneous – Continued: Page

S. 830, § 4(f)(2), 90th Cong., 1st Sess. (1967) 14-15

S. Rep. 723, 90th Cong., 1st Sess. (1967) 27

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
APPELLANT

v.

JUNE M. BETTS

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, generally proscribes discrimination against employees age 40 and older. This case involves the meaning of Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), which authorizes employers to observe the terms of employee benefit plans in certain circumstances even though older employees are disadvantaged as a result. The Equal Employment Opportunity Commission (EEOC) enforces the ADEA (29 U.S.C. 626) and has issued regulations concerning the meaning of the exception at issue (29 C.F.R. 1625.10). Accordingly, the EEOC has a substantial interest in the resolution of the question presented.[1]

[1] This case does not affect the federal government as an employer, because under 29 U.S.C. 630(b) it is not an "employer" for purposes

STATEMENT

Appellee June Betts was hired by the Hamilton County, Ohio, Board of Mental Retardation and Developmental Disabilities in 1978 at age 55. In 1985, when she was 61, Betts' employer determined that she could no longer perform her job for medical reasons and informed her that she could either retire or be placed on medical leave with no pay and no medical benefits. J.S. App. A23. Had she been under 60, she would have had a third option: disability retirement. That option was foreclosed to her, however, because of a provision in Ohio's pension law preventing persons over 60 from receiving disability pensions and allowing them to receive only regular age retirement pensions. Betts chose to retire and is currently receiving retirement benefits of $158.50 per month (*id.* at A24). If she had been eligible for disability retirement, she would receive $355.02 per month (*ibid.*).[2]

The district court concluded that appellant, the Public Employees Retirement System of Ohio (PERS), had impermissibly discriminated against Betts because of her age. Section 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a)(1), provides that "[i]t shall be unlawful for an employer to * * * discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The Ohio employee benefit plan, the

---

of the statutory provision at issue. A separate and self-contained section of the ADEA, 29 U.S.C. 633a, governs federal agencies. *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1980).

[2] The difference between ordinary retirement benefits and disability retirement benefits in Bett's case comes about because of a provision added to Ohio Rev. Code Ann. § 145.36 (Anderson 1982 & Supp. 1987) in 1976, which states that "[i]n no case shall a disability retirement benefit be less than thirty per cent * * * of [an employee's] final average salary."

court stated, is contrary to Section 4(a)(1) because "[o]n its face and in its effect, the disability retirement plan denies benefits to certain employees because they are sixty years of age or older." J.S. App. A23.

The district court rejected PERS' claim that its age-based denial of disability benefits was protected under Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2), which provides that "[i]t shall not be unlawful for an employer * * * to observe the terms of * * * any bona fide employer benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. The court agreed with the EEOC's interpretative regulation, which construes this provision to " 'permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations.' " J.S. App. A28, quoting 29 C.F.R. 860.120(a)(1) (1969) (currently designated 29 C.F.R. 1625.10(a)(1)). Here, the court concluded, the discrimination "is not justified by significant cost considerations and therefore, it is not the type of plan contemplated by the exception." J.S. App. A29.[3]

A divided court of appeals affirmed. J.S. App. A2-A19. It agreed with the Seventh Circuit that " 'where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of' " Section 4(f)(2). J.S. App. A5, quoting *Karlen*

---

[3] The district court also concluded that because Betts was disqualified from obtaining disability benefits she had been forced to retire involuntarily. The court therefore held that PERS had violated Section 4(f)(2)'s proscription against "requir[ing] or permit[ting] the involuntary retirement of any individual * * * because of the age of such individual." J.S. App. A30-A32. The court of appeals did not address that conclusion.

v. *City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), cert. denied, No. 87-1831 (June 6, 1988). Here, the court concluded, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." J.S. App. A6.

SUMMARY OF ARGUMENT

PERS discriminated against Betts on account of her age, as she would receive more than double the amount of the benefits she currently receives if she had become disabled before, rather than after, turning 60. It is undisputed that, in the absence of Section 4(f)(2), PERS would be liable under Section 4(a)(1) of the ADEA.

From the time of the enactment of the ADEA to the present, the two federal agencies that have administered the Act have consistently interpreted Section 4(f)(2) as requiring some sort of cost justification in order to permit an employer to avoid a charge of discrimination. 29 C.F.R. 860.120(b) (1969) (34 Fed. Reg. 9709 (1969)) (Department of Labor regulation); 29 C.F.R 1625.10(a)(1) (current EEOC regulation). That construction is fully consistent with the language of the provision. In enacting Section 4(f)(2), Congress meant to shield employee benefit plans that disadvantage older employees only where employers present reasonable economic justifications for doing so. This conclusion draws support from Congress's use of the phrase "such as a retirement, pension, or insurance plan." The thread common to those sorts of plans is that they entail costs that typically increase as employees age. *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.), cert. denied, 469 U.S. 820 (1984); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). Alternatively, the cost-justification rule can be derived from the requirement that a plan not serve a "a subterfuge to evade the purposes of" the Act. One purpose of the ADEA is to

abolish arbitrary discrimination against older employees, *i.e.*, discrimination that has no foundation in legitimate cost differences between older and younger employees. *EEOC* v. *City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988); *Cipriano* v. *Board of Education*, 785 F.2d 51 (2d Cir. 1986).

The legislative history also supports the conclusion that employers must provide an economic justification before they may discriminate against older employees in the provision of an employee benefit. Senator Javits, who introduced the amendment that became Section 4(f)(2), explained at the time he introduced it that it was intended to allow employers to provide different benefits to older employees "because of the often extremely high cost of providing certain types of benefits to older workers." 113 Cong. Rec. 31,254-31,255 (1967), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 145-146 (1981). Since the exception was intended to authorize employers to grant lesser benefits to older employees where benefits are more costly to provide to those employees, it is sensible to require employers to provide a cost justification for their discrimination in order to invoke Section 4(f)(2).

The courts below correctly concluded that PERS is not shielded by Section 4(f)(2) because it has offered no economic justification whatever to explain why persons who become disabled before age 60 are entitled to greater benefits than employees who become disabled after turning 60. PERS argues that it need not offer any justification for its discriminatory treatment because Congress intended to allow employers to discriminate in the provision of employee benefits as long as the discrimination is not a cover for forcing older employees to retire. But neither the language of the statute nor its legislative history provides support for the contention that Congress intended to grant

employers the right to discriminate arbitrarily in the provision of employee benefits except in that limited circumstance. Finally, there is no merit to PERS' suggestion that its plan is protected because it was established prior to the enactment of the ADEA, since the discriminatory provision at issue was added in 1976, after the ADEA took effect.

ARGUMENT

OHIO'S PUBLIC EMPLOYEES RETIREMENT SYSTEM VIOLATED THE AGE DISCRIMINATION IN EMPLOYMENT ACT BY DISQUALIFYING BETTS FROM RECEIVING DISABILITY BENEFITS SOLELY ON ACCOUNT OF HER AGE SINCE IT PROVED NO ECONOMIC JUSTIFICATION FOR ITS DISCRIMINATORY TREATMENT

A. The Public Employees Retirement System Discriminated Against Betts By Denying Her Disability Benefits

The Ohio statute at issue, Ohio Rev. Code Ann. § 145.35 (Anderson 1982 & Supp. 1987), is discriminatory on its face, as it provides that only employees who have "not attained age sixty" may apply for disability benefits. The statute thus conflicts with Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), which makes it unlawful for employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's age." There is no question that the application of Section 145.35 had a discriminatory effect here, since the monthly retirement benefit that Betts initially received was less than half of the amount of the disability benefit that she would have received if she had not been barred from applying for those benefits. Indeed, under the Ohio Public Employees Retirement System a recipient of disability benefits does not cease to receive those benefits after reaching age 60; consequently, if Betts had become eligible to obtain disability

benefits at age 59, she would continue to receive at least 30 percent of her salary after she turned 60 rather than the lesser retirement benefit that she receives instead. In short, an employee disabled before age 60 is treated significantly differently than an employee disabled after age 60 even if the younger and older employees have identical years of service, identical disabilities, and identical salaries. Thus, this case involves disparate treatment of an employee on account of her age.

B. The EEOC's Regulations Properly Interpret Section 4(f)(2) To Shelter Provisions In Employee Benefit Plans Reducing The Amount Of Benefits Paid To Older Employees Only Where Economic Considerations Justify Such Treatment

The dispositive question is whether the disparate treatment afforded Betts under Ohio law is protected under Section 4(f)(2), which authorizes an employer to observe the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. The federal agencies charged with enforcement of the ADEA have long construed this provision to permit age-based differentials in employee benefits only where such differences are justified by significant cost considerations. That construction is consistent with both the language of Section 4(2)(f) and its purposes, as revealed by the legislative history. The lower courts therefore correctly ruled that PERS may not rely on Section 4(f)(2) unless it can demonstrate a significant cost justification for its refusal to extend disability retirement benefits to persons over age 60.

1. Shortly after the enactment of the ADEA in 1967, the Department of Labor, which originally administered the Act, issued an interpretation of Section 4(f)(2). That interpretation allowed employers to discriminate against older employees in the provision of employee benefits

where the cost of such benefits was more expensive for older employees. It stated: "[A]n employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage." 29 C.F.R. 860.120(a) (1969); 34 Fed. Reg. 9709 (1969). Thus, as the Department understood Section 4(f)(2) shortly after its enactment, it permitted, for example, employers to contribute $100 annually towards the purchase of term life insurance for all employees, even though $100 would buy twice as much coverage for a 35-year-old employee as it would for a 55-year-old employee.

The Department also understood that Section 4(f)(2) did *not* authorize discrimination against older employees with respect to benefits that were not more costly to provide older employees. Noting that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision," the Department opined that in the normal case Section 4(f)(2) would not shield discrimination against older employees under the terms of profit-sharing plans. 29 C.F.R. 860.120(b) (1969); 34 Fed. Reg. 9709 (1969). Thus, in the Department's view, by the phrase "employee benefit plan such as a retirement, pension, or insurance plan" in Section 4(f)(2) Congress limited the exception to plans where the cost of providing benefits increases as employees age.

In 1979, the responsibility for enforcing the ADEA was transferred from the Department of Labor to the EEOC.

Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978). The EEOC adopted the Department of Labor's interpretation of Section 4(f)(2). The current EEOC regulations state that "its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." 29 C.F.R. 1625.10(a)(1). Like the Department of Labor's 1969 regulations, the EEOC's regulations provide that "[a] benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage" (*ibid.*).

Thus, the agencies responsible for administering the ADEA have consistently agreed – from the time of its enactment more than twenty years ago to the present – that Section 4(f)(2) is designed primarily to permit cost-justified discrimination against older workers in the provision of employee benefits. This Court has relied on "the consistent interpretation of the administrative agencies charged with enforcing" the ADEA. *Western Air Lines* v. *Criswell,* 472 U.S. 400, 412 (1985); see also *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). "[T]he EEOC's cost justification requirement constitutes the type of long-standing and contemporaneous agency interpretation deserving recognition." *EEOC* v. *City of Mt. Lebanon,* 842 F.2d 1480 (3d Cir. 1988).

2. The interpretation of Section 4(f)(2) adopted by the federal agencies charged with its enforcement is fully compatible with the statutory language. The cost-justification requirement can be derived either from the phrase "bona fide employee benefit plan such as a retirement, pension, or insurance plan," as some courts have held, or it can be viewed as implicit in the requirement that a plan not be "a

subterfuge to evade the purposes of" the Act, as other courts have suggested. Whichever phrase is given primary emphasis, the courts of appeals agree that the cost-justification standard is supported by the statutory language.

When Congress adopted the "safe harbor" provision codified as Section 4(f)(2), it listed as illustrative examples of the type of benefit plans it had in mind retirement, pension, and insurance plans. A common feature of such plans is that they tend to entail costs that rise with the age of the beneficiary. To be sure, the costs of providing benefits to older employees under retirement, pension, and insurance plans do not always increase as the age of employees increases. But they commonly do. Most obviously, it costs more to obtain term life insurance as employees age. In addition, health insurance may be more expensive to obtain for older employees. And it might be more expensive to provide the same defined benefit under a retirement or a pension plan to an employee who began work at age 55 than to an employee who began working at a much younger age. See 113 Cong. Rec. 31,255 (1967), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 146 (1981).

The Third Circuit in *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211, 224, cert. denied, 469 U.S. 820 (1984), agreed that Section 4(f)(2) incorporates an "age-related cost factor," and it grounded that requirement in the phrase "bona fide employee benefit plan such as a retirement, pension, or insurance plan."[4] In *Westinghouse*, the employer had refused to provide layoff benefits

[4] The Department of Labor similarly emphasized in 1969 that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision." It therefore concluded that Section 4(f)(2) would not shield discrimination against older employees in the provision of profit-sharing benefits

to employees age 55 and over because they qualified for retirement benefits (*id.* at 214-215). The court of appeals noted that it was "aware that the words 'such as a retirement, pension or insurance plan' were added in a descriptive sense" to Section 4(f)(2) (*id.* at 224). However, the court stated, "their description contains substance" (*ibid.*). As the court stated, those sorts of plans are "indicative of the *types* of plans in which Congress intended to allow age discrimination; they are of the type whereby the cost of benefits increases with age," since "[t]he thread common to retirement, insurance and pension plans * * * is the age-related cost factor" (*ibid.*).

Similarly, the Ninth Circuit in *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1396 (1984), concluded that "Borden's severance pay policy is not an 'employee benefit plan such as a retirement, pension, or insurance plan.' " The court explained that Congress "meant to encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits—where equal benefits would be more costly for older workers" (*ibid.*). Since severance benefits do not vary depending on the age of the worker, the Ninth Circuit, following the Third Circuit's approach in *Westinghouse*, held that the employer's severance pay policy was "a 'simple fringe benefit,' outside the scope of" Section 4(f)(2) (*id.* at 1397).[5]

because the cost of providing those benefits does not increase as employees age. 29 C.F.R. 860.120(b) (1969); 34 Fed. Reg. 9709 (1969).

[5] The discrimination here is not excused because, while denying Betts disability benefits, PERS has provided her with lesser benefits of a type listed in the statute. The employees in *Westinghouse* who were denied layoff benefits were also provided retirement benefits, but the court properly concluded that the fact that the layoff plan "is tied to Westinghouse's Pension Plan does not negate the fact that it is more analogous to a 'fringe benefit' than to the types of employee benefit plans covered under 4(f)(2)." 725 F.2d at 225. Moreover, even if a

Other courts of appeals have emphasized Section 4(f)(2)'s requirement that a plan not be "a subterfuge to evade the purposes of" the Act.[6] As in any other disparate treatment case, the question whether an employer's discriminatory treatment of older employees is a subterfuge must focus on whether the employer had a valid reason for its action or whether its stated reason is a pretext for proscribed behavior. Thus, courts must determine whether the employer's motive was nonpretextual. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In the context of Section 4(f)(2), this means the employer must demonstrate a legitimate business reason for treating older employees less generously than younger employees. As a rule, that will generally require the employer to show that it is more expensive to provide the benefit in question to older employees.

Like this case, *EEOC* v. *City of Mt. Lebanon,* 842 F.2d 1480, 1484 (3d Cir. 1988), involved a plan under which older employees were barred in some circumstances from receiving disability benefits, and had to settle for lesser retirement benefits. The court stated that the question presented was whether the employer "created the plan as a subterfuge to evade the ADEA prohibition of age discrimination" (*id.* at 1488). It concluded that Congress enacted Section 4(f)(2) because it "recognized the greater expense incurred by employers providing benefit programs for older employees," and decided that "employers should be relieved of the obligation of providing older employees

---

plan is of the sort enumerated in the statute, that does not mean that *any* discrimination against older employees under the terms of the plan, no matter how arbitrary, should be excused.

[6] The EEOC's current regulations provide that "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. 1625.10(d).

with benefits equal to benefits for younger employees when it would be more costly to do so" (*id.* at 1489). Accordingly, the court held that "[i]n order to 'cost justify' a reduced level of benefits for older employees, and thereby disprove subterfuge, an employer must establish a connection or nexus showing how general cost savings data supports the extent of reductions in its particular plan" (*id.* at 1492). Similarly, the Second Circuit in *Cipriano* v. *Board of Education,* 785 F.2d 51, 57, 58 (1986), concluded that an incentive plan under which an employer gave bonuses to employees between 55 and 60 if they retired, but did not offer similar bonuses to older employees, was a " 'subterfuge to evade the purposes of the Act' " in the absence of evidence showing a legitimate business reason for discriminating against the older employees.[7]

While the courts of appeals have emphasized different language in the text of Section 4(f)(2), they have generally agreed that where "the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2)." *Karlen,* 837 F.2d at 319; Pet. App. A5. That conclusion is fully warranted by the language of Section 4(f)(2) which limits its coverage to certain types of employee benefit plans characterized by age-

---

[7] The Second Circuit in *Cipriano* stated that it "would not wish to be understood as endorsing every detail of the regulations." 785 F.2d at 58. However, it held that an employee benefit plan that discriminated against older employees would not be protection by Section 4(f)(2) in the absence of a showing by the employer that it had "a legitimate business reason for structuring the plan as it did" (*ibid.*). The Second Circuit thus plainly rejected PERS' position, which is that it may discriminate against older employees in the provision of employee benefits as long as it does not try to force them to retire. See App. Br. 26, 48.

related costs ("a plan such as a retirement, pension, or insurance plan"), and by the language that proscribes plans that undermine the basic antidiscrimination rationale of the Act (a plan that is "a subterfuge to evade the purposes of" the Act).[8]

3. If there were any doubt about whether the EEOC's cost-justification standard is consistent with the statutory language, that doubt is resolved by the legislative history. As introduced by Senator Yarborough in 1967, Section 4(f)(2) of the bill that became the Age Discrimination in Employment Act provided only that it would not be unlawful for an employer "to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." S. 830, § 4(f)(2), 90th Cong., 1st Sess., *reprinted in* U.S. Equal Employment Opportunity

---

[8] At the end of its opinion in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 203 (1977), this Court stated that it found nothing to indicate that Congress intended to require an employer that established a retirement plan long before the enactment of the ADEA "to show an economic or business purpose in order to satisfy the subterfuge language in the Act." Contrary to appellants (Br. 22), we do not think that that statement has binding force following Congress's enactment of the 1978 amendment to Section 4(f)(2) negating the holding in *McMann*. Pub. L. No. 95-256, § 2(a), 92 Stat. 189. In any event, the statement appears to have been tied to the situation presented in that case, where the discriminatory provision had been added to the plan at issue prior to the enactment of the ADEA. Here, in contrast, the discriminatory provision in Ohio law was added in 1976, after the ADEA was enacted and after it was amended to apply to the States. Thus, no pre-ADEA provision is involved here. See pages 25-26, *infra*. Furthermore, the Court in *McMann* did not focus on the language of Section 4(f)(2) referring to plans "such as a retirement, pension, or insurance plan" or the legislative history showing that Congress plainly intended to require employers to provide an economic justification where lesser benefits are provided to older employees, but instead focused on the question presented in that case. See pages 14-20, *infra*.

Commission, *Legislative History of the Age Discrimination in Employment Act* [hereinafter *Legislative History*] 68 (1981). The bill as introduced made no reference to any circumstance that might authorize employers to discriminate against older employees in the provision of benefits. The drafters of the bill, which was termed the administration bill, probably thought such a provision unnecessary because the 1965 report of the Secretary of Labor on the problems of older employees noted that "[r]elatively few employers * * * cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons." Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964, *The Older American Worker: Age Discrimination in Employment* 16 (1965), *reprinted in Legislative History* at 33.

Senator Javits, however, thought that employers *were* concerned about the cost of providing some types of employee benefits to older persons. He criticized the administration bill for "not provid[ing] any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare* [hereinafter *Senate Hearings*], 90th Cong., 1st Sess. 27 (1967). In his view, "faced with the necessity of paying greatly increased premiums," employers might "look for excuses not to hire older workers" (*ibid.*).

Senator Smathers, a cosponsor of the administration bill, shared this concern. He agreed with Senator Javits that "[a]s presently drafted, the bill would probably be interpreted to require that workers hired for the first time between the ages of 45 and 65 be given the same private pension rights and other fringe benefits that workers are

given who began with the employer at younger ages, thus ignoring the fact that providing fringe benefits for the former can be expensive." *Senate Hearings* at 29-30. He therefore suggested an amendment "somewhat along the lines of the following: * * * Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for providing medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees" (*id.* at 30).

The next day, Senator Javits stated on the floor of the Senate that he would seek to amend the administration bill in a way that incorporated his and Senator Smathers' concerns. The proposed amendment, which was similar to Section 4(f)(2) as ultimately enacted, provided that it would not be unlawful for an employer "to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act." 113 Cong. Rec. 7077 (1967), *reprinted in Legislative History* at 72. Senator Javits explained that under his amendment "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers,* actually be discouraged from hiring older workers." 113 Cong. Rec. 31,254-31,255 (1967), *reprinted in Legislative History* at 145-146 (emphasis added). According to its drafter, therefore, a key purpose of Section 4(f)(2) was to allow employers to pay lesser benefits to older employees where it cost more to provide those benefits to older persons. See also 113 Cong. Rec. 34,746 (1967) (employers need not provide "special and

costly benefits" to older employees) (remarks of Rep. Daniels), *reprinted in Legislative History* at 157).

Senator Javits' amended version of Section 4(f)(2) had another effect as well. In a colloquy with Senator Javits, Senator Yarborough asked: "Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee * * * will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement." 113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146. Senator Javits agreed that his amendment protected an employer in such a situation from a claim that it discriminated against older employees who would not be eligible to participate in the pension plan (*ibid.*). See also H.R. Rep. 805, 90th Cong., 1st Sess. 4 (the exception permits "employment without necessarily including such [older] workers in employee benefit plans" (1967), *reprinted in Legislative History* at 78; 113 Cong. Rec. 34,746 (1967) (older employees need not "be included in all employee benefit plans") (remarks of Rep. Daniels), *reprinted in Legislative History* at 157).[9]

---

[9] PERS notes (Br. 37) that Senator Javits believed that the ADEA was not the place to "fight[ ] the pension battle." See 113 Cong. Rec. 7076 (1967), *reprinted in Legislative History* at 71. By that remark, Senator Javits was not suggesting that any type of discrimination in the provision of employee benefits should be permissible under the ADEA. Rather, he was aware that some pension plans in existence then had very long periods before benefits vested, such as the 20-year period in the plan hypothesized by Senator Yarborough, and he thought that such requirements should be changed by comprehensive pension legislation rather than by an age discrimination statute. A major change made by the Employee Retirement Income Security Act of 1974 (ERISA), of which Senator Javits was a sponsor, was that en-

Thus, in addition to allowing employers to decrease the amount of benefits paid to older employees where it costs more to provide those benefits to them, Senator Javits' version of Section 4(f)(2) was intended to allow employers to bar older employees from participating in certain plans altogether when they could not work for the employer long enough to qualify for participation in the plan. The decision to permit employers to enforce waiting periods for the vesting of pension benefits, like the decision to allow them to provide reduced benefits in some circumstances, was based on economic considerations. The amounts employers must pay into certain employee benefit plans, such as defined benefit pension plans,[10] depends on actuarial predictions of the amounts that ultimately will have to be paid in benefits. It would upset the predictions on which contributions had been based, and the actuarial soundness of some plans, if a large number of employees previously thought to be ineligible for pensions suddenly became entitled to benefits.[11]

---

titlement to benefits paid by qualified pensions plans must vest partially after five years of service and totally after ten years of service. 29 U.S.C. 1053.

[10] Defined benefit plans are pension plans where retirees receive a fixed amount per month based on factors such as final salary and years of service. They differ from defined contribution plans, under which an employer regularly contributes a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) & 1002(35).

[11] PERS (Br. 33) and amicus National Public Employers Labor Relations Association (Br. 29) note that Senator Smathers' suggested amendment, which expressly authorized variation in employee benefits where it is more expensive to provide certain benefits to older employees, was not enacted. Contrary to their suggestion, however, that in no way implies that Congress rejected his concerns. Senator Smathers never actually proposed an amendment to the Senate, but instead suggested at a hearing language "somewhat along the lines of

The concern with costs that animated the original enactment of Section 4(f)(2) was confirmed in 1978, when Congress amended Section 4(f)(2) by adding a clause providing that no employee benefit plan may "require or permit the involuntary retirement of any individual * * * because of the age of such individual." Pub. L. No. 95-256, § 2(a), 92 Stat. 189.[12] The purpose of the amendment was to overturn the result in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 193 (1977), where this Court held that involuntary retirements were permitted by Section 4(f)(2). In so ruling, the Court stated that it had found "nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or

---

the following." *Senate Hearings* at 30. Senator Javits plainly understood his amendment, which borrowed its reference to pension, retirement, and insurance plans from Senator Smathers' suggestion, to accomplish the result Senator Smathers desired, as he stressed that where the "high cost of providing certain types of benefits to older workers" exceeded the cost of providing those benefits to younger employees, employers would "not be compelled to afford older workers *exactly the same* pension, retirement, or insurance benefits." 113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146 (emphasis added).

Moreover, Senator Javits could not have adopted Senator Smathers' suggested language exactly because it did not allow employers to bar older employees from participating in employee benefit plans altogether where they could not work for the employer long enough to qualify. Senator Smathers' language authorized "variance" only. In the case of the 55-year-old employee hypothesized by Senator Yarborough in his colloquy with Senator Javits, Senator Smathers' proposed language would have required that the 55-year-old receive a lesser pension if he worked to age 65, whereas the terms of the hypothetical plan bargained by the employer and its union required 20 years of employment for an employee to qualify for a pension.

[12] The guidelines that the Department of Labor issued in 1969 provided that involuntary retirement was permitted by Section 4(f)(2). 29 C.F.R. 860.110(a) (1969); 34 Fed. Reg. 9709 (1969).

intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." 434 U.S. at 203. In the course of explaining the decision to overturn this result, Senator Javits asserted that the Court had erred by stating that an economic justification was not required to shield discrimination in the provision of employee benefits: "The meaning of the exception, as I stated in a colloquy with Senator Yarborough on the Senate floor, was that an 'employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.' " 124 Cong. Rec. 8218 (1978), *reprinted in Legislative History* at 539. By that statement, Senator Javits indicated, he had meant that "[w]elfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers" (*ibid.*).

4. Finally, the EEOC's interpretation of Section 4(f)(2) not only comports with the language and legislative history of the Act, it also finds support in important policy considerations. The cost-justification standard imports an objective criterion for determining the scope of the Section 4(f)(2) exemption—whether the disparate treatment of older workers can be justified by significant differences in the costs of providing benefits to older workers. The objective nature of the standard should result in more predictable enforcement, which in turn should encourage voluntary compliance and facilitate long-range planning in the development of employee benefit plans. The cost-justification criterion also supplies a general, neutral standard for assessing all types and varieties of employee benefit plans, regardless of the particular label that may be attached to those plans. Finally, and most importantly, the EEOC's standard follows directly from the ADEA's

anti-discrimination principle. When it costs the same to provide a particular benefit to an older employee and a younger employee, then there is no relevant difference between the two that would justify disparate treatment. But when it costs significantly more to provide a benefit to an older employee, it cannot fairly be said that the two employees are so similarly situated that it would be unfair to differentiate between them in the provision of benefits. The cost-justification standard therefore advances the most basic purpose of the ADEA: ending discrimination against older employees in the workplace.

C. Because Ohio's Public Employees Retirement System Has Offered No Economic Justification For Its Refusal To Pay Disability Benefits To Employees Over Age 59, Its Discrimination Against Older Employees Is Not Shielded By Section 4(f)(2)

PERS has not demonstrated that its disability benefits plan is the sort of plan where costs increase with the age of the participant.[13] Indeed, as the court below stated, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty." J.S. App. A6.[14] That defect is fatal, since Section

---

[13] Because Betts had five years of service, she qualified for disability benefits under Ohio law. Ohio Rev. Code Ann. § 145.35 (Anderson 1982 & Supp. 1987). Accordingly, Congress's interest in enacting Section 4(f)(2) to authorize employers to establish legitimate waiting periods before employees are entitled to participate in employee benefit plans, which was stressed by Senator Yarborough in his colloquy with Senator Javits (113 Cong. Rec. 31,255 (1967), *reprinted in Legislative History* at 146), is not implicated by this case.

[14] In its court of appeals' brief, PERS conceded that "[t]here was no evidence before the court concerning the potential increased cost to PERS based on the greater frequency of incidence of disability within the excluded age group." PERS' C.A. Br. 27.

4(f)(2) is an affirmative defense on which the defendant bears both the burden of production and persuasion. *Karlen*, 837 F.2d at 318; *Cipriano*, 785 F.2d at 57-59. In any event, there is no good reason to assume without evidence that disability benefits become more costly as employees get older. While older employees may be more likely to become disabled (a point on which there is no evidence), the court of appeals correctly noted that "the employee who becomes disabled at a younger age should draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older." J.S. App. A6. Thus, it may be that it is actually more expensive to provide disability benefits to *younger* workers.

Nor is PERS' discrimination justified because employees like Betts, unlike younger employees who become disabled, are eligible for retirement benefits under Ohio law. That explanation does not square with the effect of the Ohio statutes, since employees who obtain disability benefits do not cease to receive them when they turn 60. Rather, they continue to receive disability benefits at the rate of at least 30 percent of their "final average salary" (Ohio Rev. Code Ann. § 145.36 (Anderson 1982 and Supp. 1987), even after they turn 60 and become eligible for retirement benefits instead of disability benefits. Thus, contrary to PERS' explanation (Br. 48), the disability plan provides income to employees who have an alternative source of income.

Even if PERS disqualified all recipients from receiving disability benefits once they became eligible to receive retirement benefits, its plan would still not be shielded by Section 4(f)(2). The federal agencies administering the ADEA have concluded that employers may in certain circumstances reduce disability benefits, or replace them with lesser retirement benefits, as recipients age and become entitled to other benefits. But the circumstances in which disqualification is permitted do not include the situation presented here. In 1978, the Department of Labor noted that disability benefits are typically intended "to replace, at least partially, income which an employee would have earned but is unable to earn because of disability." 43 Fed. Reg. 43,266. Requiring disability benefits to continue without reduction until age 70 (the age at which mandatory retirement was permissible at that time), the Department continued, "rests on the unwarranted assumption that a worker who suffers from a long-term disability would, in the absence of the disability, have worked until age 70" (*id.* at 43,267). Data that the Department's Bureau of Labor Statistics had gathered showed that "the most common age at which employees retire is 65" and that, for "individuals still employed at age 60 (or later), the average remaining worklife is about 5 years" (*ibid.*). Accordingly, the Department concluded, employers should be allowed to cut off disability payments "at age 65 for any employee who becomes disabled at age 60 or less" and "5 years after the disability occurred" when employees become disabled after age 60 (*ibid.*).

The EEOC has adopted that approach. 29 C.F.R. 1625.10(f)(1)(ii). Its regulations also note that "[c]ost data may be produced to support other patterns of reduction as well" (*ibid.*). Here, PERS' reduction of benefits does not fall into the safe harbor provided by the regulations, and it has produced no cost data at all to justify its approach.

D. Appellant Errs In Contending That Section 4(f)(2) Authorizes Arbitrary Discrimination Against Older Employees Under Employee Benefit Plans And That Its Plan Is Exempt As A Pre-ADEA Plan

1. PERS contends (Br. 26) that, under Section 4(f)(2), "any plan designed to provide employees with benefits unrelated to salary or wages is exempt from the prohibitions

of the Act, provided the plan was not conceived to avoid the statute's specified purposes of facilitating the employment of older workers." PERS' amici similarly argue that Section 4(f)(2) excuses all discrimination pursuant to an employee benefit plan that is not a sham.[15] That construction, which has no support at all in the many decisions of courts of appeals construing Section 4(f)(2), totally ignores the statutory phrase "such as a retirement, pension, or insurance plan." Indeed, PERS states, contrary to the Third Circuit in *Westinghouse* (725 F.2d at 224), that that phrase "merely provides examples of the plans protected by the exemption; it does not purport to define or qualify it" (Br. 28). But if Congress had not meant to limit the types of plans protected by Section 4(f)(2), it would have omitted the phrase, so that the provision reached employee benefit plans without exception. PERS' construction also ignores the abundant legislative history showing that Congress was concerned, not with all employee benefit plans, but with plans with legitimate waiting periods and plans that provide benefits that cost more for older employees.

Moreover, PERS fails to comprehend that Section 4(a)(1) of the ADEA not only prohibits refusals to hire older employees, it also proscribes "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's age." That prohibition follows from Section 1(b) of the Act, 29 U.S.C. 621(b), which provides that

[15] The National Public Employers Labor Relations Association, for example, contends (Br. 13-14) that an employee benefit plan may discriminate against older employees except where "it is specifically designed involuntarily to deprive older workers of terms and conditions of employment that younger persons enjoy – for example, a plan that is purposefully designed and used as a cover for the involuntary retirement of older persons."

the purposes of the ADEA include "prohibit[ing] arbitrary age discrimination in employment" as well as "promot[ing] employment of older persons." As this Court has stated repeatedly, " '[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.' " *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984)).

That PERS' construction of Section 4(f)(2) is faulty is made plain by consideration of its effects, since it would allow any sort of discrimination against older employees in the provision of employee benefits. As the Seventh Circuit stated in *Karlen*, if an employer told its employees that "at age 65 you lose your free parking space (or dental insurance, or any other fringe benefit), [it] would be guilty, prima facie, of age discrimination." 837 F.2d at 318. Yet PERS' proposal would authorize just such arbitrary discrimination, since presumably it would not interfere with the "employment of older workers" (Br. 26). Indeed, PERS appears to believe that the fact that it hired Betts at age 55 insulates it from liability as long as it does not arbitrarily terminate or refuse to promote her (Br. 29, 48). If it had cut off her dental insurance or eliminated her parking space, solely on account of her age, and offered no justification for doing so, such acts would be permissible under PERS' construction of Section 4(f)(2), just as it contends that it may deny her disability benefits without providing any cost justification for its discriminatory behavior. But Congress did not intend to authorize employers arbitrarily to discriminate against older persons in the provision of employee benefits.

2. PERS also argues (Br. 16-23) that its plan is exempt from liability under Section 4(f)(2) because it was estab-

lished in 1933. There is no merit at all to that claim. The discriminatory provision in PERS' plan was added in 1976, two years after the ADEA was amended to apply to the States. See 29 U.S.C. 630(b)(2); Pub. L. No. 93-259, § 28(a)(2). Until that time, disability benefits (which are and were generally calculated like retirement benefits under Ohio law) were not required to be at least 30 percent of the employee's final average salary, and hence employees like Betts were not disadvantaged by the provision making them ineligible for disability benefits. Only with the enactment of the 1976 amendment were employees over 60 deprived of a significant benefit available to employees under 60. All of the courts of appeals that have concluded that pre-ADEA employee benefit plans are exempt from its requirements have noted that a different result would follow if, as here, the relevant provision had been added after the enactment of the ADEA. *EEOC* v. *Cargill,* 855 F.2d 682, 686 n.4 (10th Cir. 1988); *EEOC* v. *County of Orange,* 837 F.2d 420, 423 (9th Cir. 1988); see also *EEOC* v. *Home Insurance Co.,* 672 F.2d 252, 259 (2d Cir. 1982).[16]

---

[16] Consequently, this Court need not address the question whether all pre-ADEA plans are exempt from the anti-discrimination provision of the Act under Section 4(f)(2). Although this Court in *McMann* (434 U.S. at 197-198, 203) expressed the view that a pre-1967 benefit plan could not be a "subterfuge to evade the purposes of the Act," those statements should not be thought to be binding where Congress has overruled the holding of the case and has indicated its express disapproval of the Court's reasoning (see H.R. Conf. Rep. 950 at 8, *reprinted in Legislative History* at 519). The better view, we think, is that a provision that existed prior to 1967 can be said to be contrary to the Act's *purpose* of eliminating arbitrary discrimination against older employees, even though it could not have been enacted to evade the ADEA itself. Moreover, Congress in 1967 made clear that the Act applied "to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." H.R. Rep. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. 723, 90th Cong., 1st Sess. 4; *reprinted in Legislative History* at 77, 108.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

HARRY F. TEPKER, JR.
Attorney

Equal Employment Opportunity Commission

JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00082

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEE

CHRISTOPHER G. MACKARONIS
(Counsel of Record)
STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
AMERICAN ASSOCIATION OF
RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957
Attorneys for Amicus Curiae American Association of Retired Persons

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AN EMPLOYER CANNOT DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2) OF THE ADEA MERELY BY DEMONSTRATING THAT THE DISCRIMINATORY PROVISION PRE-DATED THE LAW	4
A. The Employer Bears The Burden Of Proof Under Section 4(f)(2)	4
B. Congress Has Overturned *United Air Lines, Inc. v. McMann*	6
II. IN DEFENDING A CLAIM OF BENEFITS DISCRIMINATION, ONLY AGE-RELATED COST CONSIDERATIONS CAN DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2)	13
A. The Legislative History Confirms The Limited Purpose Of Section 4(f)(2)	14
B. The Contemporaneous Administrative Interpretations of Section 4(f)(2) Requiring Proof Of Equal Benefits Or Equal Cost Have Been Specifically Endorsed By Congress	16
C. Following The 1978 Amendments, The Cost Requirement For Disproving "Subterfuge" Was Continued In Effect	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) .. 4

Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd on other grounds sub nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) 4

Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) 5, 16

Betts v. Hamilton County Board of Mental Retardation and Development Disabilities, 848 F.2d 692 (6th Cir. 1988) 13

Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 8, 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Cipriano v. Board of Education of North Tonawanda, 785 F.2d 51 (2d Cir. 1986) 5

Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 434 U.S. 99 (1977) 6

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 17, 21

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 5, 9, 14, 17

EEOC v. Cargill, Inc., 852 F.2d 682 (10th Cir. 1988) 11

EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988) 5, 6, 13

EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988) 11

EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) 7

EEOC v. State of Maine, 823 F.2d 542 (1st Cir. 1987) 11

EEOC v. Westinghouse Electric Corp., 48 Fair. Empl. Prac. Cas. [BNA] 734 (3d Cir. 1988) 13

EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984) .. 5, 13, 14

TABLE OF AUTHORITIES—Continued

Page

General Electric Co. v. Gilbert, 429 U.S. 125 (1975) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 17

Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 2038 (1988) 5, 13

Lorillard v. Pons, 434 U.S. 575 (1978) 6

McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976) 7, 8, 12, 16

Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983) 11

Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299 (1932) 4

Sikora v. American Can Co., 622 F.2d 1116 (3rd Cir. 1980) 7

Smart v. Porter Paint, 630 F.2d 490 (7th Cir. 1980) 7

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 17

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 4, 6

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) .... *passim*

United States v. Jackson, 280 U.S. 183 (1930) 17

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 12

Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 4, 10, 12, 17

Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978) 8

STATUTES

Age Discrimination in Employment Act of 1967, as amended, (ADEA), 29 U.S.C. § 621 *et seq.* 1

29 U.S.C. § 621(b) 2, 7

29 U.S.C. § 623(a) 2, 7

29 U.S.C. § 623(f)(1) 12

29 U.S.C. § 623(f)(2) .... *passim*

Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. § 1052(a)(1)(B) 16

TABLE OF AUTHORITIES—Continued

	Page
Ohio Revised Code § 145.32	16
Ohio Revised Code § 145.35	4
Ohio Revised Code § 145.35(b)	4
Pub. L. No. 93-259, 88 Stat. 74 (1974)	6
Pub. L. No. 95-256, 92 Stat. 189 (1978)	7, 21
Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979	16
Pub. L. No. 99-592, § 2(c), 100 Stat. 3342	2, 22
Reorganization Plan No. 1 of 1978, 92 Stat. 3781	3
LEGISLATIVE HISTORY	
113 Cong. Rec. 7076 (March 16, 1967), *reprinted in* Legislative History at 71	14
113 Cong. Rec. 7076-77 (March 16, 1967), *reprinted in* Legislative History at 71-72	10
113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146	15, 16
113 Cong. Rec. 34746 (December 4, 1967), *reprinted in* Legislative History at 157	15
123 Cong. Rec. 34295 (October 19, 1977), *reprinted in* Legislative History at 482	19
124 Cong. Rec. 7881 (March 21, 1978), *reprinted in* Legislative History at 528	10, 19, 20
124 Cong. Rec. 7886 (March 21, 1978), *reprinted in* Legislative History at 533	19
124 Cong. Rec. 7887 (March 21, 1978), *reprinted in* Legislative History at 534	19
124 Cong. Rec. 7888 (March 21, 1978), *reprinted in* Legislative History at 535	19
124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 538-39	10, 18
124 Cong. Rec. 8219 (March 23, 1978), *reprinted in* Legislative History at 539	20
H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* Legislative History at 519	10, 12, 17, 18
H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986)	16
Hearings on S. 830 before the Subcommittee on Labor of The Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967)	14

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* Legislative History at 443 (1981)	8, 9, 12, 17, 18
S. Rep. No. 723, 90th Cong., 1st Sess. 14, *reprinted in* Legislative History at 118 (1967)	14, 15
REGULATIONS	
29 C.F.R. § 860.120 (1979)	20
29 C.F.R. § 860.120(a) (1969)	17
29 C.F.R. § 860.120(a) (1) (1979)	5, 20
29 C.F.R. § 860.120(f) (1) (iii) (1979)	21
29 C.F.R. § 860.120(f) (1) (iv) (A) (1979)	16
29 C.F.R. § 1625.10(a) (1) (1987)	5, 20
29 C.F.R. § 1625.10(d) (1987)	20
29 C.F.R. § 1625.10(f) (1) (iii) (1987)	21
34 Fed. Reg. 9709 (June 21, 1969)	17
44 Fed. Reg. 30,648 (May 25, 1979)	20, 21
52 Fed. Reg. 23,811 (June 25, 1987)	5, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a not-for-profit corporation of more than thirty million persons age fifty and older. AARP is the largest organization of its kind in America. In representing the interests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. More than eight million AARP members are actively employed, many of whom are participating in employee benefit plans and are covered by the provisions of the Age Discrimination in Employment Act of 1967, as amended, "ADEA," 29 U.S.C. § 621 *et seq.*

The issues in this case concern the circumstances in which an employer may use age as the sole criterion for eliminating valuable employee benefits. The legal issues presented could materially affect the terms and conditions of employment of millions of working Americans and could have a profound effect on the willingness of older persons to remain actively employed. Moreover, such limitations could be detrimental to thousands of older workers whom Congress sought to benefit by the recent elimination of mandatory retirement. *See* Pub. L. No. 99-592, § 2(c), 100 Stat. 3342. AARP has a substantial interest in the resolution of these issues, and for that reason submits this brief *amicus curiae*.[1]

SUMMARY OF ARGUMENT

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). Consistent with these purposes, the ADEA broadly prohibits discrimination based on age in virtually all terms and conditions of employment. 29 U.S.C. § 623(a). Through the enactment of § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), Congress fashioned an exception designed to permit limited discrimination in employee benefit plans. The purpose of § 4(f)(2) was to ensure that employee benefits were not *more* costly for older workers, a result which specifically would have frustrated one of the ADEA's principal objectives—the hiring of older workers.

Shortly after the passage of the ADEA, regulations issued by the enforcing agency[2] limited the scope of the

[1] AARP files this brief with the written consents of the parties, which have been filed with the Clerk of the Court.

[2] Administrative and enforcement authority over the ADEA resided with the Department of Labor from the date of the Act until July 1, 1979, at which time it was transferred to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 42 Fed. Reg. 19807.

§ 4(f)(2) exception to benefit reductions that were justified by age-related costs. This limitation effectively harmonized the dual purposes of the ADEA by ensuring that older workers would neither be more expensive to hire nor would they be subject to arbitrary age-based discrimination in employee benefits.

Relying on *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the Appellant Public Employees Retirement System of Ohio (hereafter "the State") argues that it need not provide any cost justification for the exclusion of workers age sixty and older from its disability plan simply because the discriminatory provision pre-dated the ADEA. Congress has, however, explicitly rejected the State's argument.

In amending § 4(f)(2) in 1978, Congress meticulously ensured that both the "reasoning and holding" of *McMann* had been overturned. In so doing, Congress specifically embraced the existing cost principles embodied in regulations interpreting § 4(f)(2), and made clear its intent that *all* employee benefit plans, including those that predated the ADEA, must demonstrate a cost justification for benefit reductions in order to satisfy the exception.

Subsequent to the 1978 amendments, more comprehensive regulations were issued at the behest of Congress. These regulations reiterated the longstanding cost interpretation of § 4(f)(2) and specifically prohibited the type of age-based denial challenged here.

Since the State did no more than point to the pre-Act origins of the challenged disability provision, it failed to meet its burden of proof under § 4(f)(2). In consequence, the decision below should be affirmed.

ARGUMENT

I. AN EMPLOYER CANNOT DISPROVE "SUTERFUGE" UNDER SECTION 4(f)(2) OF THE ADEA MERELY BY DEMONSTRATING THAT THE DISCRIMINATORY PROVISION PRE-DATED THE LAW.

A. The Employer Bears The Burden Of Proof Under Section 4(f)(2).

Appellee June M. Betts (hereafter "Betts") was denied both disability retirement benefits and the accompanying right to resume service solely because of her age.[3] In order to escape liability from this *per se* violation of the ADEA, the State was required to justify its conduct under one of the ADEA's narrow affirmative defenses. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985). Acknowledging the age-based exclusion, the State seeks refuge in the exception for bona fide employee benefit plans set forth in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2).[4]

In response to Betts' motion for summary judgment, it was the State's responsibility to come forward with evidence sufficient to demonstrate a triable issue of fact

[3] *See* Ohio Revised Code § 145.35 (exclusion of persons age 60 and older); Ohio Revised Code § 145.35(b) (right to resume service at same or "similar position and salary").

[4] The burden of proof under § 4(f)(2) rests with the party invoking the defense. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n.24 (1985). That burden is substantial since § 4(f)(2), as an exception to remedial social legislation, is to be narrowly construed. *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U.S. 299, 311-12 (1932); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); 29 C.F.R. § 860.120(a)(1) (1979). Accordingly, the employer must show that the challenged practice "plainly and unmistakably" meets the "terms and spirit" of the remedial legislation that the ADEA represents. *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 954 (2d Cir. 1983), *aff'd in part, rev'd on other grounds, sub. nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

regarding the § 4(f)(2) defense, *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), an issue upon which the State would have the burden of proof at trial. There is unanimity among the Courts of Appeals that in order to establish the § 4(f)(2) defense, an employer must prove that the challenged action was taken (1) in observance of the terms of (2) a bona fide employee benefit plan which (3) is not a subterfuge to evade the purposes of the ADEA.[5]

Consistent with the language of § 4(f)(2),[6] both the courts and administrative regulations have limited the defense to employee benefit plans in which the cost of the challenged benefit bears some discernible relationship to the employee's age. 29 C.F.R. § 860.120(a)(1), *recodified* at 29 C.F.R. § 1625.10(a)(1); 52 Fed. Reg. 23,811 (June 25, 1987).[7] While disability plans, generically,

[5] *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 2038 (1988); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988); *Cipriano v. Board of Education of Education of North Tonawanda*, 785 F.2d 51, 57 (2d Cir. 1986); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982).

[6] The language of § 4(f)(2) qualifies the term "bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan." In interpreting this language, three Courts of Appeals have ruled "that Congress meant to exempt only certain benefit schemes from the antidiscriminatory provisions of the Act." *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *see also EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984); *Alford v. City of Lubbock*, 664, F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982).

[7] Thus, for example, neither uninsured sick leave plans, *Alford v. City of Lubbock*, 664 F.2d 1263, 1272 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982), nor severance payments based on years of service, *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984), are "bona fide employee benefit plans" within the meaning of § 4(f)(2). *See also* 29 C.F.R. § 1625.10(a).

appear to be the type of plans intended to fall within the defense because they involve age-related cost considerations, *see EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988), the State's failure to show the incorporation of any age-related cost factors in its plan constitutes a failure of proof that the plan is a "bona fide plan" within the meaning of § 4(f)(2).

B. Congress Has Overturned *United Air Lines, Inc. v. McMann.*

Beyond the "bona fide plan" hurdle, the employer must prove that reducing or denying a benefit based on age is not a "subterfuge." The State argues that it met this burden by demonstrating that the provision excluding all employees age 60 and older pre-dated the ADEA. The State argues, in effect, that in passing the ADEA in 1967, Congress intended to perpetuate, *ad infinitum*, all age-based benefits discrimination then in effect.[8]

This implausible result is wholly unsupported either in the statute or its legislative history. With the passage of the ADEA, Congress "broadly prohibit[ed] arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985), *quoting Lorillard v. Pons*, 434 U.S. 575, 577 (1978). *See also Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 434 U.S. 99 (1977) ("the ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment"). The State's argument contravenes the broad remedial pur-

[8] The State's rationale, if correct, would apply to both public and private employee benefit plans, exempting private plans enacted prior to 1967, the date of passage of the ADEA, and exempting all state and local plans enacted prior to 1974, when Congress extended the ADEA to cover those entities. *See* Pub. L. No. 93-259, 88 Stat. 74 (1974).

poses of the ADEA to prohibit "arbitrary age discrimination" (§ 2(b), 29 U.S.C. § 621(b)) in "terms, conditions, or privileges of employment. 29 U.S.C. § 623(a)(1). Moreover, it has been specifically rejected by Congress.

Relying exclusively on this Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), the State argues that a pre-Act plan, by virtue of its date of origin, cannot be a subterfuge within the meaning of § 4(f)(2). State's Br. at 16-21.[9]

The amendment of § 4(f)(2), Pub. L. No. 95-256, 92 Stat. 189 (1978), overruling *McMann* and the amendment's legislative history demonstrate, however, that the State errs by relying upon *McMann* as authoritative support for that proposition. The history of the 1978 amend-

[9] By arguing that pre-Act plans are *per se* "not a subterfuge," the State argues in essence that Congress intended to sanction all age-based distinctions in pre-Act plans, no matter how arbitrary or invidious. However, the *maintenance* as well as the institution of a plan can evidence the intent necessary to demonstrate that the plan is a subterfuge to evade the purposes of the Act. *See United Air Lines, Inc. v. McMann*, 434 U.S. at 219 n.13 (Marshall, J., dissenting); *McMann v. United Air Lines, Inc.*, 542 F.2d 217, 221 (4th Cir. 1976) ("the legislative history [of the original ADEA] makes it clear that . . . [t]o avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act." (emphasis added).

Focusing upon the institution of a plan, as appellant urges, is particularly inappropriate in this case. As Betts explains in her brief, there have been significant amendments to the disability plan at issue here since 1974, when the ADEA was extended to state and local governments. Indeed, the addition of a thirty percent minimum disability benefit in 1976 has exacerbated the adverse effect of the disability exclusion upon older workers, and must be independently justified. *See EEOC v. Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982); *Smart v. Porter Paint*, 630 F.2d 490 (7th Cir. 1980). *Cf. Sikora v. American Can Co.*, 622 F.2d 1116, 1124 (3d Cir. 1980) (alterations made after ADEA passage may be examined to see if changes were designed to evade the purposes of the Act).

ment to § 4(f)(2) clearly indicates that Congress intended to overrule *McMann's* specific holding that involuntary retirement pursuant to a pre-Act plan was permissible, and its more general conclusion that an employer could demonstrate compliance with the "not a subterfuge" language of § 4(f)(2) by pointing to the pre-Act origins of a benefit plan.

In 1977, when Congress was considering amendments to the ADEA, the courts of appeal were in disagreement as to whether the "bona fide" and "subterfuge" language contained in § 4(f)(2) permitted mandatory retirement before age 65 pursuant to the terms of a retirement plan. In *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), and *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), the Third and Fifth Circuits ruled that the language of the exception permitted involuntary retirement. Specifically, the Fifth Circuit in *Taft Broadcasting* held that a retirement plan "effectuated far in advance of the enactment of the law" could not be a subterfuge for evasion of the Act or its purposes. 500 F.2d at 215. In contrast, the Fourth Circuit, in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), ruled that a forced retirement pursuant to a pre-Act plan would be considered a "subterfuge" to evade the purposes of the Act absent an employer's showing of a legitimate business purpose for the age-based action. *Id.* at 220.

The Senate Report issued in 1977 accompanying the bill to amend § 4(f)(2) (H.R. 5383) noted this conflict among the courts of appeals in interpreting the section and stated its "approval of the result reached by the Fourth Circuit in *McMann*." S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* EEOC Legislative History of the Age Discrimination in Employment Act of 1967 at 443 (1981) (hereafter "Legislative History"). Specifically rejecting the legal proposition upon which the State relies here, the Report stated:

> The *Tart* (sic) court found the language of the section [4(f)(2)] unambiguous and refused to consider the legislative history. *It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of section 4(f)(2) if it was operative before the effective date of the act.*

S. Rep. No. 493, 95th Cong., 1st Sess. 10, *reprinted in* Legislative History at 443 (emphasis added).

Prior to the passage of the amendment, this Court reversed the decision of the Fourth Circuit in *McMann*. This Court held that under § 4(f)(2), a bona fide[10] retirement plan could lawfully impose mandatory retirement. That holding was premised on this Court's reasoning that a plan could not constitute a subterfuge—that is, "a scheme, plan, strategem or artifice"—to evade the Act or its purposes if the plan pre-dated the Act.

Within a matter of months,[11] Congress "overruled"[12] the *McMann* decision by passing an amendment to § 4(f)(2) which states "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [covered by the Act]." The House and Senate Conference Committee Report explaining the amendment makes clear that the "subterfuge" clause was never intended to provide a blanket exception for all pre-existing employee benefit plans. The Report explains:

---

[10] The Court noted that the plan at issue there was conceded by the parties to be "bona fide 'in the sense that it exists and pays benefits' ", *McMann*, 434 U.S. at 194 and n.2, and the Court therefore undertook no independent inquiry as to the meaning of "bona fide."

[11] In his dissent in *McMann*, Justice Marshall cautioned that the effect of *McMann* would "be short lived," 434 U.S. at 218, recognizing that the Senate and House had passed amendments to overturn the majority's decision.

[12] *EEOC v. Borden's, Inc.*, 724 F.2d at 1395 n.4.

> In *McMann v. United Airlines*, 98 S. Ct. 24 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). *The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fat they antedate the act or these amendments.*

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* Legislative History at 519 (emphasis added); *see* remarks of Senator Javits ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that case.'") (emphasis added) 124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 538-39; remarks of Representative Hawkins (the "conferees specifically disagree with the Supreme Court's . . . reasoning . . . particularly its conclusion that *an employee benefit plan* which discriminates on the basis of age *is protected by section 4(f)(2) because it pre-dates the enactment of the ADEA.*") (emphasis added) 124 Cong. Re. 7881 (March 21, 1978), *reprinted in* Legislative Histoy at 528.[13]

---

[13] During consideration of the 1978 amendments, Senator Javis, "an active proponent of [ADEA] legislation" in both 1967 ad 1978, *see Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 46 n.22 (1985), stated that the *dissent* in *McMann* correctly interpreted § 4(f)(2). 124 Cong. Rec. 8218 (March 23, 1978), *reprinid in* Legislative History at 539. Justice Marshall, in the dissent o which Senator Javits referred, stated his "emphatic disagreemat with [the majority and Justice Stewart's] suggestion that a pe-Act plan cannot be a subterfuge to avoid the purposes of the Ac" 434 U.S. at 218 n.13. Senator Javits's comments regarding § 4(f)() are particularly instructive, since in 1967 he introduced the amendment to the administration bill which became the final versiom f § 4(f)(2). 113 Cong. Rec. 7076-77 (March 16, 1967), *reprinted n* Legislative History at 71-72.

In circumstances similar to these, this Court has held that both the premise and holding of a decision "overruled" by Congress are invalid. In *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983), this Court construed the Pregnancy Discrimination Act of 1978. That Act was passed for the express purpose of overturning the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1975), which interpreted the anti-discrimination provisions in Title VII of the Civil Rights Act of 1964. In *Newport News*, this Court rejected the argument that Congress intended only to overrule *Gilbert's* result, an interpretation which would have limited Congress's action to prohibiting discrimination against female employees. Instead, since "Congress . . . *unambiguously expressed its disapproval of both the holding and the reasoning of the court in the Gilbert decision*," 462 U.S. at 678 (emphasis added), this Court concluded that the "premises" of *Gilbert* were overturned,[14] 462 U.S. at 685, and that the amendment was intended to also proscribe discrimination against male employees. *Compare Newport News*, 462 U.S. at 678, with 462 U.S. at 693-95 (Rehnquist, J., dissenting).

Nevertheless, that State argues that the explicit legislative history regarding § 4(f)(2) should be ignored. On the contrary, it is clear that the 1978 legislative history of § 4(f)(2) is germane in resolving the meaning of "subterfuge." The cornerstone of this Court's reasoning in *McMann* and of its disagreement with the Fourth Circuit was the premise that § 4(f)(2) requires no showing of business purpose for age-based policies contained in pre-Act plans. *See McMann*, 434 U.S. at 198, 203. The

---

[14] The reasoning of *Newport News* similarly repudiates the circuit court decisions that rely on the reasoning of *McMann* as valid while recognizing that *McMann's* holding has been legislatively overruled. *See EEOC v. Cargill, Inc.*, 852 F.2d 682 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. State of Maine*, 823 F.2d 542 (1st Cir. 1987).

conferees' unambiguous statement that *McMann's* "reasoning" was erroneous establishes that Congress disagreed not only with *McMann's* holding regarding forced retirement, but also with the Court's subterfuge analysis on which the holding was predicated.

Indeed, the State's argument that the 1978 legislative history can be discarded because the term "subterfuge" was not actually amended (State's Br. at 17-18) conflicts with the analysis of this Court in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). In *Criswell*, this Court considered another ADEA exception, the "bona fide occupational qualification" ("BFOQ") defense contained in § 4(f)(1) of the Act, 29 U.S.C. § 623(f)(1). Even though § 4(f)(1) was not amended in 1978, a unanimous Court relied heavily upon the legislative history of the 1978 amendments in arriving at the appropriate standard governing § 4(f)(1). The Court concluded that "Congress, in considering the 1978 Amendments, implicitly endorsed the two-part inquiry [for a BFOQ] identified by the Fifth Circuit" in its decision in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). 472 U.S. at 415.

In *Criswell*, evidence of congressional "endorsement" of the *Tamiami* standard was found in the Senate Report, S. Rep. No. 493, 95th Cong., 1st Sess. 10-11, *reprinted in* Legislative History at 443-44, and in the Conference Report, H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, *reprinted in* Legislative History at 518. *Criswell*, 472 U.S. at 415. These same sources of legislative history relied upon by this Court in *Criswell* establish Betts' position here: that Congress refuted the "reasoning" of the Fifth Circuit in *Taft Broadcasting Co.* and of the Supreme Court in *McMann*, and that it endorsed the decision of the Fourth Circuit in *McMann*, which held that all employee benefit plans, regardless of their date of origin, must demonstrate a legitimate business purpose to satisfy the "subterfuge" standard of § 4(f)(2).

II. IN DEFENDING A CLAIM OF BENEFITS DISCRIMINATION, ONLY AGE-RELATED COST CONSIDERATIONS CAN DISPROVE "SUBTERFUGE" UNDER SECTION 4(f)(2).

In its decision below, the Sixth Circuit held that the denial of disability benefits to Betts violated the ADEA in light of the State's "failure to introduce any cost figures or other economic justification for the different treatment of employees over sixty." *Betts v. Hamilton County Board of Mental Retardation and Development Disabilities*, 848 F.2d 692 (6th Cir. 1988).

Like the court below, other courts of appeals have required proof of a cost justification when employee benefits have been reduced or eliminated based on age.[15] In defending an age-based benefit denial, as here, an employer can disprove "subterfuge" only by demonstrating that equal benefits are provided or that equal cost for benefits is incurred.[16]

---

[15] *EEOC v. Westinghouse Electric Corp.*, 48 Fair Empl. Prac. Cas. [BNA] 734 (3d Cir. 1988), ("Westinghouse II") (severance payments denied to employees electing pension benefits); *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (reduction in payment of accumulated sick leave, denial of health insurance); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988) (denial of disability benefits at age 60); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (denial of severance pay for pension-eligible employees age 55 and over).

[16] Contrary to the State's suggestion, it is not a "difficult task" to reconcile the cost standard utilized by the enforcement agency and the courts with the definition of "subterfuge" set forth in *McMann*. (State's Br. at 24 n.12). This Court's general definition of "subterfuge" as a "scheme, plan, stratagem or artifice" was developed in the context of involuntary retirement, a practice which Congress has since made clear was never permissible under § 4(f)(2). In the context of a benefit reduction (or cessation), the only type of practice to which the § 4(f)(2) exception applies, Congress, the enforcement agencies and the courts have uniformly declared that a benefit reduction which *is not* cost justified is, in effect, a "subterfuge," *i.e.*, a "scheme, plan, stratagem or artifice of evasion."

The legislative history of § 4(f)(2), as well as the contemporaneous and longstanding administrative interpretations of that section, confirm the quantifiable standards by which the court below addressed the "subterfuge" issue. The legislative history demonstrates that Congress wished to provide employers with the flexibility to make only those differentiations in benefit levels necessitated by age-related costs. *See EEOC v. Borden's, Inc.*, 724 F.2d at 1396; *EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 224-25.

A. The Legislative History Confirms The Limited Purpose Of Section 4(f)(2).

During consideration of the ADEA in 1967, Congress acknowledged that the cost of providing certain benefits to newly-hired older workers can be higher than providing the same benefits to younger workers. Senator Javits proposed the amendment which became § 4(f)(2) [17] in order to provide employers with the "flexibility" to make necessary distinctions based on age and thereby to ensure that employers would not be "discouraged from hiring older workers because of the increased costs associated with providing benefits to them." S. Rep. No. 723, 90th Cong., 1st Sess. 14, *reprinted in* Legislative History at 118; *Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967); *see also EEOC v. Borden's, Inc.*, 724 F.2d at 1396.[18] Senator Javits explained:

[17] 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in* Legislative History at 71.

[18] The State argues, in effect, that in order to encourage the hiring of older workers, Congress enacted a compromise in the form of § 4(f)(2) which "exempt[ed] from the Act's coverage the full panoply of employee benefit plans that otherwise might have discouraged employers from becoming full partners in the effort to eliminate arbitrary age discrimination." State's Br. at 39. The State's reading of the purposes of § 4(f)(2) goes too far. In order to eliminate any disincentives to hire older workers, Congress needed only to ensure that they were of comparable expense to younger workers. Congress did not, as the State suggests, create a two-tiered system of protection in which older workers were "cheap" labor entitled to few, if any, of the Act's protections.

> The meaning of this [§ 4(f)(2)] provision is as follows: An employer will not be compelled under this section to afford to older workers *exactly the same* pension, retirement, or insurance benefits as he affords to younger workers.

113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146 (emphasis supplied).[19] Thus, the intent of Congress in enacting § 4(f)(2) was to ensure that employers need not provide "exactly the same benefits" when to do so would result in the type of undue expense that could discourage the hiring of older workers.[20]

[19] *See also* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967) ("This exception serves to emphasize the primary purpose of the bill—hiring of older workers—without necessarily including such workers in employee benefit plans."); remarks of Senator Yarborough (amendment will not deny older workers employment but will "limit [their] rights to obtain *full* consideration" in benefit plans) 113 Cong. Rec. 31255 (November 6, 1967), *reprinted in* Legislative History at 146 (emphasis supplied); remarks of Representative Daniels (§ 4(f)(2) "is designed to maximize employment possibilities *without working an undue hardship on employers in providing special and costly benefits.*") 113 Cong. Rec. 34746 (December 4, 1967), *reprinted in* Legislative History at 157 (emphasis added).

[20] Contrary to the State's argument (State's Br. at 36-37), statements in the 1967 legislative history indicating that some exclusions of older workers could be permissible under the Act are not applicable here for two simple reasons. First, the discussions concerning exclusions uniformly pertained to plans which excluded employees from participation at the date of hire, not to plans like the one challenged here, which exclude *all employees based on age*, regardless of service. There is not a shred of legislative history showing that Congress intended to permit employers to deprive long-service employees of benefits upon the attainment of an arbitrary age.

Second, mention in 1967 of exclusions from an employee benefit plan clearly pertained to pension plans. Indeed, those references

B. The Contemporaneous Administrative Interpretations of Section 4(f)(2) Requiring Proof Of Equal Benefits Or Equal Cost Have Been Specifically Endorsed By Congress.

Shortly after passage of the Act, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted the "subterfuge" provision of § 4(f)(2) as implementing a congressional intent that age-based differences in employee benefits be permitted where justified by valid cost considerations. This 1969 interpretation articulated an "equal benefit or equal cost" principle as follows:

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. § 860.120(a), 34 Fed. Reg. 9709 (June 21, 1969). *See EEOC v. Borden's, Inc.*, 724 F.2d at 1396. As a contemporaneous construction of the statute by the enforcement agency, the "equal benefit or equal cost" principle is entitled to great deference by the courts. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. Jackson*, 280 U.S. 183, 196-97 (1930).

In passing the 1978 amendments to the ADEA, Congress dispelled any doubt about whether the "equal benefit or equal cost" requirement for disproving "subterfuge" was consistent with Congress' original intent in enacting § 4(f)(2). The Senate Report accompanying the 1978 amendments (the first amendments to § 4(f)(2) since passage of the Act) implicitly embraced the existing interpretations of § 4(f)(2) by declaring:

> This bill would not alter existing law with respect to these practices. *Existing principles of law*, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, *would be the standard by which these practices will be evaluated.*

S. Rep. No. 493, 95th Cong., 1st Sess. 5, *reprinted in* Legislative History at 438 (emphasis added). Since this Court in *Criswell* relied on a virtually identical statement as congressional "endorsement" of the *Tamiami* standards under the BFOQ exception, 472 U.S. at 415, it is likewise clear that Congress "endorsed" the long-standing method of disproving "subterfuge." *Compare* H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, *re-*

---

manifest congressional intent not to force employers to include in a *pension plan* newly hired older workers who could not possibly meet the vesting requirements of those plans and whose inclusion would unduly disrupt the actuarial and cost expectations under which the plans operated. Comments of Senator Yarborough, 113 Cong. Rec. 31255 (1967), *reprinted in* Legislative History at 146; *see also Alford v. City of Lubbock*, 604 F.2d 1263, 1270 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *cf. McMann v. United Air Lines, Inc.*, 542 F.2d at 221.

Furthermore, the exclusions referred to in the 1967 legislative history were later narrowly drawn by the employee Retirement Income Security Act of -974 ("ERISA"), 29 U.S.C. § 1052(a)(1)(B) (employees can only be excluded from defined benefit pension plans, and then only if hired within five years of the normal retirement age in the plan). The limited exclusions in ERISA were adopted by regulation to apply to all employers covered by the ADEA, 29 C.F.R. § 860.120(f)(1)(iv)(A) (1979), and are included in the Ohio statutes at Ohio Revised Code § 145.32 (all employees, regardless of age at hire, must have five years of service to be eligible for retirement benefits). In 1986, Congress amended the ADEA and ERISA to prohibit, *inter alia*, the exclusion of any employee from any pension plan based on age at date of hire. *See* Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979 and H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986) (overall objectives of these amendments is to assure that employee benefit plans do not discriminate on the basis of age).

printed in Legislative History at 518 ("the amendment neither added to nor worked any change upon present law") *with* S. Rep. No. 493, 95th Cong., 1st Sess. 5, *reprinted in* Legislative History at 438 ("Existing principles of law . . . would be the standard by which these practices will be evaluated").[21]

Moreover, the existing principles under § 4(f)(2) were repeatedly, and specifically, recited by managers of the amendments and other members of Congress as the appropriate view of the law. Senate Javits, while addressing the proposed amendment of § 4(f)(2), repeated the existing interpretation almost verbatim:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. *Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*

124 Cong. Rec. 8218 (March 23, 1978), *reprinted in* Legislative History at 539 (emphasis supplied); *see* remarks of Senator Williams, Majority Manager of ADEA amendments, ("[Javits] statements are consistent with the position taken by the Department of Labor regarding these matters.") *Id. See also* remarks of Senator

[21] The State's implausible suggestion regarding the meaning of this portion of the legislative history is that it constituted an adoption of the legal standards set forth in *Taft Broadcasting*, the very decision Congress intended to overturn by passing the 1978 amendments. *See* State's Br. at 45.

Williams ("Section 4(f)(2) was intended to permit . . . varying coverage of workers in different age groups to reflect those [cost] differences so long as they are based on valid assumptions. . . .") 123 Cong. Rec. 34295 (October 19, 1977), *reprinted in* Legislative History at 482.

The statements of managers and other legislators from the House confirmed that § 4(f)(2) authorizes only reductions in benefits necessitated by costs. Remarks of Rep. Hawkins ("the purpose of section 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher.") 124 Cong. Rec. 7881 (March 21, 1978), *reprinted in* Legislative History at 528. Furthermore, they noted that the exception does not authorize precisely the type of total cut off of benefits challenged here. Remarks of Rep. Wiess ("it is not the intention of this amendment to have older workers cut off from their health and benefit plans the day they reach age 65 . . . [employers] should not interpret the 1977 (sic) amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees.") 124 Cong. Rec. 7887 (March 21, 1978), *reprinted in* Legislative History at 534.[22]

C. Following The 1978 Amendments, The Cost Requirement For Disproving "Subterfuge" Was Continued In Effect.

After the passage of the 1978 amendments, the Department of Labor, in response to congressional requests

[22] *See also* Remarks of Rep. Waxman ("In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act.") 124 Cong. Rec. 7888 (March 21, 1978), *reprinted in* Legislative History at 535; remarks of Rep. Pepper, 124 Cong. Rec. 7886 (March 21, 1978), *reprinted in* Legislative History at 533.

for more comprehensive guidance regarding § 4(f)(2),[23] issued an amendment to its Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. § 860.120, 44 Fed. Reg. 30,648 (May 25, 1979).[24] It provided:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations . . . . Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. § 860.120(a)(1) (1979), *recodified at* 29 C.F.R. § 1625.10(a)(1). In accord with this interpretation, the regulations provide that an employer can demonstrate that a plan provision is "not a subterfuge" and is consistent with the Act's purpose, by showing that "the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. § 1625.10(d). Thus, the 1979 interpretations of the meaning of subterfuge continued in effect the cost principle consistently enunciated by the enforcing agency and previously endorsed by

---

[23] *See* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978); remarks of Senators Williams and Javits, ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans, and the Secretary is urged to act as soon as possible.") 124 Cong. Rec. 8219 (March 23, 1978), *reprinted in* Legislative History at 539.

[24] These regulations have since been recodified by the EEOC at 29 C.F.R. § 1625.10. *See* 52 Fed. Reg. 23,811 (June 25, 1987).

Congress. As a longstanding, consistent interpretation of § 4(f)(2), the interpretation is entitled to special deference. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 (1981).

In addition to reiterating the standard for disproving subterfuge in a benefits case, the interpretation explicitly applied the cost standard to disability benefits. 29 C.F.R. § 860.120(f)(1)(iii) (1979).[25] The interpretations emphasized that an employer may only reduce disability benefits based on age to the extent required by the increased cost of providing the benefit to older workers. *Id.* Moreover, the interpretations specifically state that a total cut off of disability benefits based on age is not permissible under the Act. *Id.* This interpretation remains in effect today. 29 C.F.R. § 1625.10(f)(1)(iii).

CONCLUSION

In 1978, Congress specifically rejected the sole argument upon which the State attempts to justify its arbitrary exclusion of employees age 60 and older from receiving disability benefits. For twenty years, the consistent interpretation of § 4(f)(2) by the enforcing agency has required proof of age-related cost considerations in order to prove that a benefit reduction or elimination is not a "scheme, plan, stratagem or artifice" to evade the ADEA. Contrary to the State's argument, the regulations help to eliminate arbitrary discrimination while at the same time facilitating the hiring of older

---

[25] The purpose of the 1979 interpretations was to provide guidance to employers who were required to extend the privileges and benefits of employment to workers age 65 to 70 who became protected as a result of the 1978 amendments to the ADEA. *See* Pub. L. No. 95-256, § 12(a), 92 Stat. 189; 44 Fed. Reg. 30,648 (May 25, 1979). The State argues, illogically, that Congress endorsed discrimination against employees age 60 and older who were already protected by the ADEA—while extending the Act's protections to employees age 65 to 70.

persons. The continued harmonization of these two objectives, as embodied in the regulations and adopted by the courts, is especially important in light of the elimination of mandatory retirement for virtually all workers in both the private and federal sector. *See* Pub. L. No. 99-592, § 2(c), 100 Stat. 3342. For all these reasons, AARP respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

CHRISTOPHER G. MACKARONIS
(Counsel of Record)
STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES
AMERICAN ASSOCIATION OF
RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049
(202) 662-4957
Attorneys for Amicus Curiae
American Association of
Retired Persons

Dated: January 31, 1989